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2482
No. 11662-11666

see vol. 2483
United States

Circuit Court of Appeals

For the Ninth Circuit.

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

IN FOUR VOLUMES

VOLUME I

Pages 1 to 450

**Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division**

No. 11662-11666

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 19138

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and

PHILLIP HIMMELFARB,

Defendants.

INDICTMENT

Count One

(Sec. 145 (b), I.R.C.; 26 U.S.C. 145 (b))

The grand jury charges:

That on or about the 15th day of March, 1945, in the Southern District of California, and within the jurisdiction of this Court, Sam Ormont and Phillip Himmelfarb did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by Sam Ormont to the United States of America for the calendar year 1944 (1) by preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income and victory tax return wherein they stated that his net income for said calendar year was the sum of \$12,174.57 for income tax [2] purposes, and that the amount of tax due and owing thereon was the sum of

\$3626.58, whereas, as they then and there well knew, his net income for the said calendar year was the sum of \$36,982.52 for income tax purposes, upon which said net income he owed to the United States of America an income tax of \$18,143.12; and (2) by concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received by him during the said calendar year and the sources thereof.

Count Two

(Sec. 145 (b), I.R.C.; 26 U.S.C., 145 (b))

The grand jury further charges:

That on or about the 14th day of March, 1945, in the Southern District of California, and within the jurisdiction of this Court, Sam Ormont and Phillip Himmelfarb did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by Phillip Himmelfarb to the United States of America for the calendar year 1944 (1) by preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income tax return wherein they stated that his net income for said calendar year, computed on the community property basis, was the sum of \$4111.74 for income tax purposes and that the amount of tax due and owing thereon was the sum of \$656.00, whereas, as they

then and there well knew, his net income for the said calendar year, computed on the community property basis, was the sum of \$17,752.65, upon which said net income he owed to the United States of America an income tax of \$5843.91; and (2) by concealing and attempting to conceal from the said Collector [3] and any and all proper officers of the United States the true and correct gross and net incomes received by him during the said calendar year and the sources thereof.

Count Three

(Sec. 145 (b), I.R.C.; 26 U.S.C., 145 (b))

The grand jury further charges:

That on or about the 15th day of March, 1944, in the Southern District of California, and within the jurisdiction of this Court, Sam Ormont did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1943 (1) by preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income and victory tax return wherein he stated that his net income for said calendar year was the sum of \$11,934.56 for income tax purposes and \$12,194.62 for victory tax purposes and that the amount of income and victory tax due and owing thereon was the sum of \$3228.25, whereas, as he then and there well knew, his net

income for the said calendar year was the sum of \$30,512.86 for income tax purposes and \$30,587.05 for victory tax purposes, upon which said net income he owed to the United States of America an income and victory tax of \$13,461.29; and (2) by concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received by him during the said calendar year and the sources thereof. [4]

Count Four

(Sec. 145 (b), I.R.C.; 26 U.S.C., 145 (b))

The grand jury further charges:

That on or about the 15th day of March, 1943, in the Southern District of California, and within the jurisdiction of this Court, Sam Ormont did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1942 (1) by preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of \$10,891.52 and that the amount of tax due and owing thereon was the sum of \$2477.91, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$14,423.42, upon which said net income

he owed to the United States of America an income tax of \$3875.84; and (2) by concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received by him during the said calendar year and the sources thereof.

/s/ JAMES M. CARTER,
United States Attorney.

A True Bill:

/s/ R. W. BLANCHARD,
Foreman.

[Endorsed]: Filed Jan. 22, 1947. [5]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Phillip Himmelfarb, by his attorneys, Daly B. Robnett and Benjamin F. Kosdon, and moves the Court for an order dismissing the above-entitled case, and the Indictment rendered and filed therein, and each and all of the separate counts thereof, on the following grounds:

1. That Count One of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant.

2. That Count One of said Indictment does not state facts sufficient to constitute a crime or offense

by this defendant, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or unpaid from defendant Sam Ormont to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income [6] tax alleged to have been the sum of \$18,143.12, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income tax, nor whether or not the said income tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant prepared or filed the alleged false and fraudulent income and victory tax return of defendant Sam Ormont, or whether or not his co-defendant, the said Sam Ormont, prepared and filed the same;

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not this de-

fendant, or either defendant, "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return of defendant, Sam Ormont;

(g) That it does not appear therein and cannot be ascertained therefrom whether or not any of the acts alleged to have been done or caused to be done by the defendants or either of them, were "wilful";

(h) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return of defendant Sam Ormont, nor whether or not said defendant Sam Ormont authorized or ratified any such acts of this defendant, nor whether or not this defendant aided in the preparation or filing of any such return, nor [7] which of the defendants, if either, made the statements of the net income or the amount of tax;

(i) That it does not appear therein and cannot be ascertained therefrom that defendants, or either of them, ever prepared or filed any return of defendant Sam Ormont's "Gross Income" with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner the defendants, or either of them, could be guilty of attempting to defeat and evade a large part of the income tax due from defendant Sam Ormont for the year 1944, by preparing or filing a false and fraudulent "victory tax return" for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of defendant Sam Ormont was for the year 1944;

(l) That it does not appear therein what the basis is for the figure of \$36,982.52 which plaintiff alleges was the net income for income tax purposes;

(m) That it does not appear therein what portion of the alleged income tax of \$18,143.12 was or is claimed as "Victory Tax" and what portion is claimed as "Normal Tax" and what portion is claimed as "Surtax";

(n) That it does not appear therein what or who were "proper officers of the United States" other than the Collector of Internal Revenue, from whom defendants are charged with "concealing and attempting to conceal" the true and correct gross and net incomes received by defendant Sam Ormont;

(o) That it does not appear therein what the "true and correct" gross incomes of defendant Sam Ormont were, or was, which it is claimed these defendants concealed or attempted to conceal;

(p) That it does not appear therein how or in what manner this defendant, or either of the defendants, could be guilty of any offense for concealing or attempting to conceal "the sources" of [8] defendant Sam Ormont's gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting to conceal "the sources" of defendant Sam Ormont's gross and/or net income, constituted any

violation of Section 145 (b), I. R. C., and/or 26 U. S. C. 145 (b), which it is claimed that the defendants violated, for the reason that said provisions of law under which said indictment was returned to not require any such disclosure, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

3. That Count One of said indictment does not state facts sufficient to constitute an offense by this defendant, and is uncertain for the reason that it does not appear therein that this defendant was a person required under the law to collect, account for, pay over, or pay the income or income tax of said Sam Ormont in said Count alleged, or any part thereof.

4. That two separate alleged offenses are set forth in said Count One and not separately stated, in this, that an alleged felony for attempting to defeat and evade income tax under subdivision (b) of Section 145, under which said indictment was rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constitutes only a misdemeanor under sub-paragraph (a) of said section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense.

5. That said Count One of said Indictment is ambiguous and unintelligible in each of the particulars specified in paragraph 2 hereinbefore set forth.

6. That Count Two of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant, or either of them.

7. That Count Two of said Indictment does not state facts [9] sufficient to constitute a crime or offense by this defendant, or either of them, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or paid from this defendant to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax alleged to have been the sum of \$5843.91, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income tax, nor whether or not the said income tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant prepared or filed the alleged false and fraudulent income and victory tax return, or whether

or not his co-defendant Sam Ormont, prepared and filed the same;

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return;

(g) That it does not appear therein and cannot be ascertained therefrom whether or not any of the acts alleged to have been done or caused to be done by the defendants, or either of them were “wilful”;

(h) That it does not appear therein and cannot be ascertained [10] therefrom whether or not the defendant Sam Ormont “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return for this defendant, nor whether or not this defendant authorized or ratified any such acts of defendant Sam Ormont, nor whether or not defendant Sam Ormont aided in the preparation or filing of any such return, nor which of the defendants, if either, made the statements of the net income or the amount of tax of this defendant;

(i) That it does not appear therein and cannot be ascertained therefrom that defendants, or either of them, ever prepared or filed any return of this defendant’s “Gross Income” with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner the defendants, or either of them, could be guilty of attempting to defeat and evade

a large part of the income tax due from this defendant for the year 1944, by preparing or filing a false and fraudulent income tax return for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of this defendant was for the year 1944;

(l) That it does not appear therein what the basis is for the figure of \$17,752.65 which plaintiff alleges was the net income for income tax purposes;

(m) That it does not appear therein what portion of the alleged income tax of \$5843.91 was or is claimed as "Victory Tax" and what portion is claimed as "Normal Tax" and what portion is claimed as "Surtax";

(n) That it does not appear therein what or who were "proper officers of the United States" other than the Collector of Internal Revenue, from whom defendants are charged with "concealing and attempting to conceal" the true and correct gross and net incomes received by this defendant. [11]

(o) That it does not appear therein what the "true and correct" gross incomes of this defendant were, or was, which it is claimed these defendants concealed and attempted to conceal;

(p) That it does not appear therein how or in what manner this defendant, or either of them, could be guilty of any offense for concealing or attempting to conceal "the sources" of this defendant's gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting

to conceal "the sources" of this defendant's gross and/or net income, constituted any violation of Section 145 (b), I. R. C.; and/or 26 U. S. C. 145 (b), which it is claimed that the defendants violated, for the reason that said provisions of law under which said indictment was returned do not require any such disclose, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

8. That two separate alleged offenses are set forth in said Count Two and not separately stated, in this, that an alleged felony for attempting to defeat and evade the income tax under subdivision (b) of Section 145, under which said indictment was rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constitutes only a misdemeanor under sub-paragraph (a) of said Section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense.

9. That said Count Two of said indictment is ambiguous and unintelligible in each of the particulars specified in paragraph 7 hereinbefore set forth.

10. That Count Three of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant.

11. That Count Three of said Indictment does not state facts [12] sufficient to constitute a crime

or offense on the part of this defendant, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or paid from defendant Sam Ormont to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom whether or not any part of the alleged income tax alleged to have been the sum of \$13,461.29, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom whether or not any part of the alleged income and victory tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income and victory tax, nor whether or not the said income and victory tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant prepared or filed the alleged false and fraudulent income and victory tax return, or whether or not his co-defendant Sam Ormont, prepared and filed the same;

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant "wilfully" prepared, or caused to be pre-

pared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return of defendant Sam Ormont, or whether or not the defendant Sam Ormont “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the said alleged false and fraudulent income and victory tax return;

(g) That it does not appear therein and cannot be ascertained therefrom whether or not any of the acts alleged to have been done or caused to be done by the defendants or either of them were “wilful”;

(h) That it does not appear therein and cannot be ascertained therefrom whether or not the defendant Phillip Himmelfarb “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return for the defendant Sam Ormont, nor whether or not said defendant Sam Ormont authorized or ratified any such acts of this defendant, nor whether or not this defendant aided in the preparation or filing of any such return, nor which of the defendants, if either, made the statements of the net income or the amount of tax;

(i) That it does not appear therein and cannot be ascertained therefrom that defendants, or either of them, ever prepared or filed any return of defendant Sam Ormont’s “Gross Income” with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner the defendants, or either of them, could be guilty of attempting to defeat and evade a

large part of the income tax due from defendant Sam Ormont for the year 1943, by preparing or filing a false and fraudulent income and victory tax return for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of defendant Sam Ormont was for the year 1943;

(l) That it does not appear therein what the basis is for the figure of \$30,512.86 which plaintiff alleges was the net income for income tax purposes; nor what the basis is for the figure of \$30,587.05 which plaintiff alleges was the net income for victory tax purposes;

(m) That it does not appear therein what portion of the alleged income and victory tax of \$13,461.29 was or is claimed as "Victory Tax" and what portion is claimed as "Normal Tax" and what portion is claimed as "Surtax";

(n) That it does not appear therein what or who were "proper officers of the United States" other than the Collector of [14] Internal Revenue, from whom the defendant Sam Ormont is charged with "concealing and attempting to conceal" the true and correct gross and net incomes received by defendant Sam Ormont;

(o) That it does not appear therein what the "true and correct" gross incomes of defendant Sam Ormont were, or was, which it is claimed the defendant Sam Ormont concealed and attempted to conceal;

(p) That it does not appear therein how or in what manner defendant Sam Ormont, or either of the defendants, could be guilty of any offense for concealing or attempting to conceal "the sources" of defendant Sam Ormont's gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting to conceal "the sources" of defendant Sam Ormont's gross and/or net income, constituted any violation of Section 145 (b), I. R. C.; and/or 26 U. S. C. 145 (b), which it is claimed that the defendant Sam Ormont violated, for the reason that said provisions of law under which said indictment was returned do not require any such disclosure, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

12. That Count Three of said indictment does not state facts sufficient to constitute an offense by this defendant, or either of them, and is uncertain for the reason that it does not appear therein that this defendant was a person required under the law to collect, account for, pay over, or pay the income or income tax of said Sam Ormont in said Count alleged, or any part thereof.

13. That two separate alleged offenses are set forth in said Count Three and not separately stated, in this, that an alleged felony for attempting to defeat and evade income tax under subdivision (b)

of Section 145, under which said indictment was rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constitutes only a misdemeanor under sub-paragraph (a) of said [15] Section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense.

14. That said Count Three of said Indictment is ambiguous and unintelligible in each of the particulars specified in paragraph 11 hereinbefore set forth.

15. That Count Four of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant, or either of them.

16. That Count Four of said Indictment does not state facts sufficient to constitute a crime or offense by these defendants, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or paid from defendant Sam Ormont to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax alleged to have been the sum of \$3875.84, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income tax, nor whether or not the said income tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not defendant Sam Ormont prepared or filed the alleged false and fraudulent income tax return, or whether or not this defendant prepared and filed the same; [16]

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not defendant Sam Ormont “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income tax return;

(g) That it does not appear therein and cannot be ascertained therefrom whether or not any of the acts alleged to have been done or caused to be done by this defendant, or either defendant, were “wilful”;

(h) That it does not appear therein and cannot be ascertained therefrom whether or not the defendant Sam Ormont “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income tax return for

defendant Sam Ormont, nor whether or not said defendant Sam Ormont authorized or ratified any such acts of this defendant, nor whether or not this defendant aided in the preparation or filing of any such return, nor which of the defendants, if either, made the statements of the net income or the amount of tax;

(i) That it does not appear therein and cannot be ascertained therefrom that this defendant, or either defendant, ever prepared or filed any return of defendant Sam Ormont's "Gross Income" with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner this defendant, or either defendant, could be guilty of attempting to defeat and evade a large part of the income tax due from defendant Sam Ormont for the year 1942, by preparing or filing a false and fraudulent income tax return for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of defendant Sam Ormont was for the year 1942;

(l) That it does not appear therein what the basis is for the figure of \$14,423.42 which plaintiff alleges was defendant Sam Ormont's net income for said calendar year; [17]

(m) That it does not appear therein what portion of the alleged income tax of \$3875.84 was or is claimed as "Normal Tax" and what portion is claimed as "Surtax";

(n) That it does not appear therein what or who were "proper officers of the United States" other than the Collector of Internal Revenue, from whom the defendant Sam Ormont is charged with "concealing and attempting to conceal" the true and correct gross and net incomes received by defendant Sam Ormont;

(o) That it does not appear therein what the "true and correct" gross incomes of defendant Sam Ormont were, or was, which it is claimed said defendant Sam Ormont concealed and attempted to conceal;

(p) That it does not appear therein how or in what manner this defendant, or either of the defendants, could be guilty of any offense for concealing or attempting to conceal "the sources" of defendant Sam Ormont's gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting to conceal "the sources" of defendant Sam Ormont's gross and/or net income, constituted any violation of Section 145 (b), I. R. C.; and/or 26 U. S. C. 145 (b), which it is claimed that said defendant Sam Ormont violated, for the reason that said provisions of law under which said indictment was returned do not require any such disclosure, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

17. That Count Four of said indictment does not state facts sufficient to constitute an offense by

this defendant, or either of them, and is uncertain for the reason that it does not appear therein that this defendant was a person required under the law to collect, account for, pay over, or pay the income or income tax of said Sam Ormont in said Count alleged, or any part thereof.

18. That two separate alleged offenses are set forth in said [18] Count Four and not separately stated, in this, that an alleged felony for attempting to defeat and evade income tax under subdivision (b) of Section 145, under which said indictment was rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constitute only a misdemeanor under sub-paragraph (a) of said Section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense.

19. That said Count Four of said Indictment is ambiguous and unintelligible in each of the particulars specified in paragraph 16 hereinbefore set forth.

DALY B. ROBNETT and
BENJAMIN F. KOSDON,
/s/ DALY B. ROBNETT,
Attorneys for Defendant
Phillip Himmelfarb.

Notice of Hearing

To James M. Carter, United States Attorney:

You are hereby notified that the undersigned, attorneys for the defendant named in the foregoing Motion, will present said Motion to the above-entitled court on Monday, the 10th day of February, 1947, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard.

Dated February 3, 1947.

DALY B. ROBNETT and
BENJAMIN F. KOSDON,

By /s/ DALY B. ROBNETT,

Received copy of the foregoing Motion and Notice of Hearing, this 3rd day of February, 1947.

JAMES M. CARTER,

By /s/ WILLIAM STRONG,

Assistant United States
Attorney.

[Endorsed]: Filed Feb. 3, 1947.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Sam Ormont, by his attorneys, Daly B. Robnett and Benjamin K. Kosdon, and moves the Court for an order dismissing the above-entitled case, and the Indictment ren-

dered and filed therein, and each and all of the separate counts thereof, on the following grounds:

1. That Count One of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant.

2. That Count One of said Indictment does not state facts sufficient to constitute a crime or offense by this defendant, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or unpaid from this defendant to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income [21] tax alleged to have been the sum of \$18,143.12, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income tax, nor whether or not the said income tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not this de-

fendant prepared or filed the alleged false and fraudulent income and victory tax return, or whether or not his co-defendant Phillip Himmelfarb, prepared and filed the same;

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return;

(g) That it does not appear therein and cannot be ascertained therefrom whether or not any of the acts alleged to have been done or caused to be done by the defendants or either of them, were "wilful";

(h) That it does not appear therein and cannot be ascertained therefrom whether or not the defendant Phillip Himmelfarb "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return for this defendant Sam Ormont, nor whether or not this defendant authorized or ratified any such acts of said defendant Phillip Himmelfarb, nor whether or not said defendant Himmelfarb aided in the preparation or filing of any such return, nor which of the defendants, if either, made the statements of the net income or the amount of tax;

(i) That it does not appear therein and cannot be ascertained therefrom that defendants, or either of them, ever prepared or filed any return of this defendant's "Gross Income" with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner the defendants, or either of them, could be guilty of attempting to defeat and evade a large part of the income tax due from this defendant for the year 1944, by preparing or filing a false and fraudulent "victory tax return" for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of this defendant was for the year 1944;

(l) That it does not appear therein what the basis is for the figure of \$36,982.52 which plaintiff alleges was the net income for income tax purposes;

(m) That it does not appear therein what portion of the alleged income tax of \$18,143.12 was or is claimed as "Victory Tax" and what portion is claimed as "Normal Tax" and what portion is claimed as "Surtax";

(n) That it does not appear therein what or who were "proper officers of the United States" other than the Collector of Internal Revenue, from whom defendants are charged with "concealing and attempting to conceal" the true and correct gross and net incomes received by this defendant;

(o) That it does not appear therein what the "true and correct" gross incomes of this defendant were, or was, which it is claimed this defendant concealed and attempted to conceal;

(p) That it does not appear therein how or in what manner this defendant, or either of the defendants, could be guilty of any offense for conceal-

ing or attempting to conceal "the sources" of [23] this defendant's gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting to conceal "the sources" of this defendant's gross and/or net income, constituted any violation of Section 145 (b), I. R. C.; and/or 26 U. S. C. 145 (b), which it is claimed that the defendants violated, for the reason that said provisions of law under which said indictment was returned do not require any such disclosure, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

3. That two separate alleged offenses are set forth in said Count One and not separately stated, in this, that an alleged felony for attempting to defeat and evade income tax under subdivision (b) of Section 145, under which said indictment was rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constituted only a misdemeanor under sub-paragraph (a) of said Section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense.

4. That said Count One of said Indictment is ambiguous and unintelligible in each of the particulars specified in paragraph 2 hereinbefore set forth.

5. That Count Two of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant.

6. That Count Two of said Indictment does not state facts sufficient to constitute an offense by this defendant, and is uncertain for the reason that it does not appear therein that this defendant was a person required under the law to collect, account for, pay over, or pay the income or income tax of said Phillip Himmelfarb in said count alleged, or any part thereof.

7. That Count Two of said Indictment does not state facts [24] sufficient to constitute a crime or offense by this defendant, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or paid from defendant Phillip Himmelfarb to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax alleged to have been the sum of \$5843.91, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income tax, nor whether or not the said income tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not defendant Sam Ormont prepared or filed the alleged false and fraudulent income and victory tax return, or whether or not his co-defendant Phillip Himmelfarb, prepared and filed the same;

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not defendant Phillip Himmelfarb “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return;

(g) That it does not appear therein and cannot be ascertained therefrom whether or not any of the acts alleged to have been done or caused to be done by the defendants, or either of them, were “wilful”; [25]

(h) That it does not appear therein and cannot be ascertained therefrom whether or not this defendant Sam Ormont “wilfully” prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return for the defendant Phillip Himmelfarb, nor whether or not the defendant Phillip Himmelfarb authorized or ratified any such acts of this defendant Sam Ormont, nor whether or not this defendant Sam Ormont aided in the preparation or filing of any such return, nor which of the defendants, if either, made the statements of the net income or the amount of tax of the defendant Phillip Himmelfarb;

(i) That it does not appear therein and cannot be ascertained therefrom that defendants, or either of them, ever prepared or filed any return of defendant Phillip Himmelfarb's "Gross Income" with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner the defendants, or either of them, could be guilty of attempting to defeat and evade a large part of the income tax due from defendant Phillip Himmelfarb for the year 1944, by preparing or filing a false and fraudulent income tax return for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of defendant Phillip Himmelfarb was for the year 1944;

(l) That it does not appear therein what the basis is for the figure of \$17,752.65 which plaintiff alleges was the net income for income tax purposes;

(m) That it does not appear therein what portion of the alleged income tax of \$5843.91 was or is claimed as "Victory Tax" and what portion is claimed as "Normal Tax" and what portion is claimed as "Surtax";

(n) That it does not appear therein what or who were "proper officers of the United States" other than the Collector of Internal Revenue, from whom defendants are charged with "concealing and attempting to conceal" the true and correct gross and net incomes received by defendant Phillip Himmelfarb;

(o) That it does not appear therein what the "true and correct" gross incomes of defendant Phillip Himmelfarb were, or was, which it is claimed these defendants concealed and attempted to conceal;

(p) That it does not appear therein how or in what manner defendant Phillip Himmelfarb, or either of the defendants, could be guilty of any offense for concealing or attempting to conceal "the sources" of defendant Phillip Himmelfarb's gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting to conceal "the sources" of defendant Phillip Himmelfarb's gross and/or net income, constituted any violation of Section 145 (b), I. R. C.; and/or 26 U. S. C. 145 (b), which it is claimed that the defendants violated, for the reason that said provisions of law under which said indictment was returned do not require any such disclosure, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

8. That two separate alleged offenses are set forth in said Count Two and not separated stated, in this, that an alleged felony for attempting to defeat and evade income tax under subdivision (b) of Section 145, under which said indictment was rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constitutes only a misdemeanor

under sub-paragraph (a) of said Section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense.

9. That said Count Two of said Indictment is ambiguous and unintelligible in each of the particulars specified in paragraph 7 hereinbefore set forth.

10. That Count Two of said Indictment does not state facts [27] sufficient to constitute a crime or offense on the part of defendant Phillip Himelfarb.

11. That Count Three of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant.

12. That Count Three of said Indictment does not state facts sufficient to constitute a crime or offense by this defendant, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or paid from this defendant to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax alleged to have been the sum of \$13,461.29, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income and victory tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income and victory tax, nor whether or not the said income and victory tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant prepared or filed the alleged false and fraudulent income and victory tax return, or whether or not his co-defendant Phillip Himmelfarb, prepared and filed the same;

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return;

(g) That it does not appear therein and cannot be ascertained [28] therefrom whether or not any of the acts alleged to have been done or caused to be done by the defendants or either of them, were "wilful";

(h) That it does not appear therein and cannot be ascertained therefrom whether or not the defendant Phillip Himmelfarb "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income and victory tax return for this defendant, Sam Ormont, nor whether or not this defendant authorized or ratified any such acts of said defendant Phillip Himmelfarb, nor whether or not said defendant Phillip

Himmel'arb aided in the preparation or filing of any such return, nor which of the defendants, if either, made the statements of the net income or the amount of tax;

(i) That it does not appear therein and cannot be ascertained therefrom that defendants, or either of them, ever prepared or filed any return of this defendant's "Gross Income" with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner the defendants, or either of them, could be guilty of attempting to defeat and evade a large part of the income tax due from this defendant for the year 1943, by preparing or filing a false and fraudulent income and victory tax return for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of this defendant was for the year 1943;

(l) That it does not appear therein what the basis is for the figure of \$30,512.86 which plaintiff alleges was the net income for income tax purposes; nor what the basis is for the figure of \$30,587.05 which plaintiff alleges was the net income for victory tax purposes;

(m) That it does not appear therein what portion of the alleged income and victory tax of \$13,461.29 was or is claimed as "Victory tax" and what portion is claimed as "Normal Tax" and what [29] portion is claimed as "Surtax";

(n) That it does not appear therein what or who were “proper officers of the United States” other than the Collector of Internal Revenue, from whom this defendant is charged with “concealing and attempting to conceal” the true and correct gross and net incomes received by this defendant;

(o) That it does not appear therein what the “true and correct” gross incomes of this defendant were, or was, which it is claimed this defendant concealed and attempted to conceal;

(p) That it does not appear therein how or in what manner this defendant, or either of the defendants, could be guilty of any offense for concealing or attempting to conceal “the sources” of this defendant’s gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting to conceal “the sources” of this defendant’s gross and/or net income, constituted any violation of Section 145 (b), I. R. C.; and/or 26 U. S. C. 145 (b), which it is claimed that the defendant violated, for the reason that said provisions of law under which said indictment was returned do not require any such disclosure, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

13. That two separate alleged offenses are set forth in said Count Three and not separately stated, in this, that an alleged felony for attempting to defeat and evade income tax under subdivision (b) of Section 145, under which said indictment was

rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constitutes only a misdemeanor under subparagraph (a) of said Section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense.

14. That said Count Three of said Indictment is ambiguous and [30] unintelligible in each of the particulars specified in paragraph 12 hereinbefore set forth.

15. That Count Four of said Indictment does not state facts sufficient to constitute a crime or offense on the part of this defendant.

16. That Count Four of said Indictment does not state facts sufficient to constitute a crime or offense by this defendant, and is uncertain in the following particulars:

(a) That it does not appear therein and cannot be ascertained therefrom whether or not there is any income tax due or paid from this defendant to the plaintiff;

(b) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax alleged to have been the sum of \$3875.84, has not been paid or remains unpaid;

(c) That it does not appear therein and cannot be ascertained therefrom, whether or not any part of the alleged income tax was unpaid at the time the indictment was voted, rendered or returned;

(d) That it does not appear therein and cannot be ascertained therefrom, what sum or sums, if any, have been paid on account of said alleged income tax, nor whether or not the said income tax or any part thereof remained unpaid at the time said indictment was found;

(e) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant prepared or filed the alleged false and fraudulent income tax return, or whether or not his co-defendant Phillip Himmelfarb, prepared and filed the same;

(f) That it does not appear therein and cannot be ascertained therefrom, whether or not this defendant "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income tax return; [31]

(g) That it does not appear therein and cannot be ascertained therefrom whether or not any of the acts alleged to have been done or caused to be done by this defendant, or either defendant, were "wilful";

(h) That it does not appear therein and cannot be ascertained therefrom whether or not the defendant Phillip Himmelfarb "wilfully" prepared, or caused to be prepared, or filed or caused to be filed, the alleged false and fraudulent income tax return for this defendant, Sam Ormont, nor whether or not this defendant authorized or ratified any such acts of said defendant Phillip Himmelfarb, nor whether or not said defendant Phillip Himmelfarb aided in the preparation or filing of any such return, nor

which of the defendants, if either, made the statements of the net income or the amount of tax;

(i) That it does not appear therein and cannot be ascertained therefrom that this defendant, or either defendant, ever prepared or filed any return of this defendant's "Gross Income" with the Internal Revenue Department;

(j) That it does not appear therein how or in what manner this defendant, or either defendant, could be guilty of attempting to defeat and evade a large part of the income tax due from this defendant for the year 1942, by preparing or filing a false and fraudulent income tax return for said year;

(k) That it does not appear therein and cannot be ascertained therefrom what the "Gross Income" of this defendant was for the year 1942;

(l) That it does not appear therein what the basis is for the figure of \$14,423.42 which plaintiff alleges was this defendant's net income for said calendar year:

(m) That it does not appear therein what portion of the alleged income tax of \$3875.84 was or is claimed as "Normal Tax" and what portion is claimed as "Surtax";

(n) That it does not appear therein what or who were [32] "proper officers of the United States" other than the Collector of Internal Revenue, from whom this defendant is charged with "concealing and attempting to conceal" the true and correct gross and net incomes received by this defendant;

(o) That it does not appear therein what the "true and correct" gross incomes of this defendant were, or was, which it is claimed this defendant concealed and attempted to conceal;

(p) That it does not appear therein how or in what manner this defendant, or either of the defendants, could be guilty of any offense for concealing or attempting to conceal "the sources" of this defendant's gross income or net income;

(q) That it does not appear therein how or in what manner the alleged concealing and attempting to conceal "the sources" of this defendant's gross and/or net income, constituted any violation of Section 145 (b), I. R. C.; and/or 26 U. S. C. 145 (b), which it is claimed that this defendant violated, for the reason that said provisions of law under which said indictment was returned do not require any such disclosure, and neither of the defendants was under any duty or obligation to make any such disclosure under said law.

17. That two separate alleged offenses are set forth in said Count Four and not separately stated, in this, that an alleged felony for attempting to defeat and evade income tax under subdivision (b) of Section 145, under which said indictment was rendered, is attempted to be joined with a possible or questionable offense of concealing "sources of income" which latter does not constitute any offense, or if so, constitutes only a misdemeanor under sub-paragraph (a) of said Section 145; and said indictment does not show or allege wherein any failure to disclose the said "sources" of income constituted any offense;

18. That said Count Four of said Indictment is ambiguous and unintelligible in each of the particulars specified in paragraph 16 hereinbefore set forth. [33]

DALY B. ROBNETT and
BENJAMIN F. KOSDON,
By /s/ DALY B. ROBNETT,
Attorneys for Defendant
Sam Ormont.

Notice of Hearing

To James M. Carter, United States Attorney:

You are hereby notified that the undersigned, attorneys for the defendant named in the foregoing Motion, will present said Motion to the above-entitled court on Monday, the 10th day of February, 1947 at the hour of ten o'clock a.m., or as soon there after as counsel can be heard.

Dated February 3, 1947.

DALY B. ROBNETT and
BENJAMIN F. KOSDON,
By /s/ DALY B. ROBNETT,
Attorneys for said defendant.

Received copy of the foregoing Motion and Notice of Hearing, this 3rd day of February, 1947.

JAMES M. CARTER,
By /s/ WILLIAM STRONG,
Asst. United States Attorney.

[Endorsed]: Filed Feb. 3, 1947. [35]

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes now the defendant, Phillip Himmelfarb, by his attorneys Daly B. Robnett and Benjamin F. Kosdon, and moves the Court for an order requiring the United States of America, plaintiff, to furnish said defendant Phillip Himmelfarb, within a time to be therein specified, a written Bill of Particulars, in the above-entitled case, as to the following matters alleged in the Indictment herein to-wit:

1. Facts and figures showing the basis of the figure of \$36,982.52, which it is alleged in Count One of said Indictment defendant Sam Ormont's "Net income for the said calendar year . . . for income tax purposes."

2. An itemized statement of the various items, sums and figures used by said plaintiff in determining that defendant Sam Ormont's net income for the calendar year of 1944 was the sum of \$36,982.52 for income tax purposes, as alleged in the said Count One of said Indictment. [36]

3. An itemized statement of the sources from which derived, and the several amounts and the various items comprising and forming the basis for the sum of \$36,982.52, and of each component part thereof, alleged to be the net income of defendant Sam Ormont for 1944, as set forth in said Count One of Said Indictment.

4. An itemization of the portion of said alleged \$36,982.52 alleged in said Count One, which con-

stituted the net income for the calculation of defendant Sam Ormont's "Normal Tax" as provided in Section 11 of Chapter 1 of the Internal Revenue Code, as amended by "Individual Income Tax Act of 1944."

5. An itemization of the portion of the \$36,982.52 alleged in said Count One, which constituted the "surtax net income" of defendant Sam Ormont for the year 1944, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

6. An itemization of the portion of the \$36,982.52 alleged in said Count One, which constituted the "Victory Tax Net Income" alleged in said Count One of said Indictment.

7. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Sam Ormont's "net income for the said calendar year was the sum of \$36,982.52 for income tax purposes," in said Count One.

8. Facts, figures, items and sources showing the "gross income" of said defendant for said year 1944, from which plaintiff determined and alleges that "his net income for the said calendar year was the sum of \$36,982.51 for income tax purposes."

9. Facts, figures, items and nature of credits and deductions, [37] if any, made from such "gross income" before calculating, determining and alleging the "net income" subject to "normal tax," and likewise the credits and deductions, if any, made from such "gross income" before calculating and

determining the "surtax net income" and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "Victory Tax Net Income."

10. Facts and figures showing the basis of the alleged income tax of defendant Sam Ormont in the total sum of \$18,143.12, as alleged in said Count One of said Indictment.

11. Facts and figures showing the credits and deductions, if any, made and credited, on said \$36,982.52 before calculating the "normal income tax" in the sum of \$18,143.12 alleged in said Count One.

12. Facts and figures showing the credits and deductions, if any, made and credited, on said \$36,982.52 before calculating the "surtax".

13. Facts and figures showing the credits and deductions, if any, made and credited, on said \$36,982.52, before calculating the alleged "Victory Tax."

14. Facts and figures showing the "net income" which was subject to the "Normal Tax"; and the facts and figures showing the "surtax net income"; and facts and figures showing the "Victory Tax net income."

15. Facts and figures showing what part or portion of the alleged \$18,143.12 which it is alleged defendant Sam Ormont owed the United States of America as income tax for said year 1944, is "Normal Tax", and what portion is "Surtax", and what portion is Alleged "Victory Tax".

16. A statement of dates and amounts of payments made by defendant [38] Sam Ormont on account of the income tax on the said items comprising said \$36,982.52 alleged net income.

17. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$36,982.52 net income.

18. A statement of the dates and amounts of payments made by defendant Sam Ormont on account of the alleged tax of \$18,143.52.

19. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$18,143.52, by payments made by defendant Sam Ormont.

20. A statement of the portion, if any, of the alleged tax of \$18,143.52 which was unpaid at the time said Indictment was rendered.

21. Facts and figures showing the basis of the figure of \$17,752.65, which it is alleged in Count Two of said Indictment was defendant Phillip Himmelfarb's "Net income for the said calendar year."

22. An itemized statement of the various items, sums and figures used by said plaintiff in determining that defendant Phillip Himmelfarb's net income for the calendar year of 1944 was the sum of \$17,752.65 for income tax purposes, as alleged in the said Count Two of said Indictment.

23. An itemized statement of the sources from which derived, and the several amounts and the

various items comprising and forming the basis for the sum of \$17,752.65, and of each component part thereof, alleged to be the net income of defendant Phillip Himmelfarb for 1944, as set forth in said Count Two of said [39] Indictment.

24. An itemization of the portion of said alleged \$17,752.65 alleged in said Count Two, which constituted the net income for the calculation of defendant Phillip Himmelfarb's "Normal Tax" as provided in Section 11 of Chapter 1 of the Internal Revenue Code, as amended by "Individual Income Tax Act of 1944."

25. An itemization of the portion of the \$17,752.65 alleged in said Count Two, which constituted the "surtax net income" of defendant Phillip Himmelfarb for the year 1944, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

26. An itemization of the portion of the \$17,752.65 alleged in said Count Two, which constituted the "Victory Tax Net Income" alleged in said Count Two of said Indictment.

27. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Phillip Himmelfarb's "net income for the said calendar year was the sum of \$17,752.65," in said Count Two.

28. Facts, figures, items and sources showing the "gross income" of defendant Phillip Himmelfarb for said year 1944, from which plaintiff determined and alleges that "his net income for the said calendar year was the sum of \$17,752.65."

29. Facts, figures, items and nature of credits and deductions, if any, made from such "gross income" before calculating, determining and alleging the "net income" subject to "normal tax," and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "surtax net income" [40] and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "Victory Tax Net Income."

30. Facts and figures showing the basis of the alleged income tax of defendant Phillip Himmel-farb in the total sum of \$5843.91, as alleged in said Count Two of said Indictment.

31. Facts and figures showing the credits and deductions, if any, made and credited, on said \$17,752.65 before calculating the "normal income tax" in the sum of \$5843.91 alleged in said Count Two.

32. Facts and figures showing the credits and deductions, of any, made and credited, on said \$17,752.65 before calculating the "surtax".

33. Facts and figures showing the credits and deduction, if any, made and credited, on said \$17,752.65, before calculating the alleged "Victory Tax".

34. Facts and figures showing the "net income" which was subject to the "Normal Tax"; and facts and figures showing the "surtax net income;" and facts and figures showing the "Victory Tax net income."

35. Facts and figures showing what part or portion of the alleged \$5843.91 which it is alleged that defendant Phillip Himmelfarb owed the United States of America as income tax for said year 1944, is "Normal Tax", and what portion is "Surtax", and what portion is alleged "Victory Tax".

36. A statement of dates and amounts of payments made by defendant Phillip Himmelfarb on account of the income tax on the said items comprising said \$17,752.65 alleged net income.

37. A statement of the dates and amounts of credits for payments [41] to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$17,752.65 net income.

38. A statement of the dates and amounts of payments made by this defendant Phillip Himmelfarb on account of the alleged tax of \$5843.91.

39. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$5843.91, by payments made by defendant Phillip Himmelfarb.

40. A statement of the portion, if any, of the alleged tax of \$5843.91 which was unpaid at the time said Indictment was rendered.

41. Facts and figures showing the basis of the figure \$30,512.86, which it is alleged in Count Three of said Indictment was defendant Sam Ormont's "Net income for the calendar year 1943 . . . for income tax purposes."

42. Facts and figures showing the basis of the figure of \$30,587.05, which it is alleged is said Count Three was defendant Sam Ormont's "Net income for the said calendar year . . . for victory tax purposes."

43. An itemized statement of the various items, sums and figures used by said plaintiff in determining that defendant Sam Ormont's net income for the calendar year of 1943 was the sum of \$30,512.86 for income tax purposes, as alleged in the said Count Three of said Indictment.

44. An itemized statement of the various items, sums and figures used by said plaintiff in determining that defendant Sam Ormont's net income for the calendar year of 1943 was the sum of \$30,587.05 for Victory Tax purposes, as alleged in the said Count Three of said Indictment. [42]

45. An itemized statement of the sources from which derived, and the several amounts and the various items comprising and forming the basis for the sum of \$30,512.86, and of each component part thereof, alleged to be the net income of defendant Sam Ormont for 1943 for income tax purposes, as set forth in said Count Three of said Indictment.

46. An itemized statement of the sources from which derived, and the several amounts and the various items comprising and forming the basis for the sum of \$30,587.05, and of each component part thereof, alleged to be the net income of defendant Sam Ormont for 1943 Victory Tax purposes, as set forth in said Count Three of said Indictment.

47. An itemization of the portion of said alleged \$30,512.86 alleged in said Count Three, which constituted the net income for the calculation of defendant Sam Ormont's "Normal Tax" as provided in Section 11 of Chapter 1 of the Internal Revenue Code, as amended by "Individual Income Tax Act of 1943."

48. An itemization of the portion of the \$30,512.86 alleged in said Count Three, which constituted the "surtax net income" of defendant Sam Ormont for the year 1943, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

49. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Sam Ormont's "net income for the said calendar year was the sum of \$30,512.86 for income tax purposes," in said Count Three.

50. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant [43] Sam Ormont's "net income for the said calendar year was the sum of \$30,587.05 for victory tax purposes," in said Count Three.

51. Facts, figures, items and sources showing the "gross income" of defendant Sam Ormont for said year 1943, from which plaintiff determined and alleges that "his net income for the said calendar year was the sum of \$30,512.86 for income tax purposes."

52. Facts, figures, items and nature of credits and deductions, if any, made from such "gross income" before calculating, determining and alleg-

ing the "net income" subject to "normal tax," and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "surtax net income," and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "Victory Tax Net Income."

53. Facts and figures showing the basis of the alleged income tax of defendant Sam Ormont in the total sum of \$13,461.29, as alleged in said Count Three of said Indictment.

54. Facts and figures showing the credits and deductions, if any, made and credited, on said \$30,512.86 before calculating the "normal income tax" in the sum of \$13,461.29 alleged in said Count Three.

55. Facts and figures showing the credits and deductions, if any, made and credited, on said \$30,512.86 before calculating the "surtax."

56. Facts and figures showing the "net income" which was subject to the "Normal Tax"; and facts and figures showing the "surtax net income"; and facts and figures showing the "Victory Tax net income." [44]

57. Facts and figures showing what part or portion of the alleged \$13,461.29 which it is alleged defendant Sam Ormont owed the United States of America as income and victory tax for said year 1943, is "Normal Tax", and what portion is "Surtax", and what portion is alleged "Victory Tax".

58. A statement of dates and amounts of payments made by defendant Sam Ormont on account

of the income tax on the said items comprising said \$30,512.86 alleged net income for income tax purposes.

59. A statement of dates and amounts of payments made by defendant Sam Ormont on account of the victory tax on the said items comprising said \$30,587.05 alleged net income for victory tax purposes.

60. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$30,512.86 net income for income tax purposes.

61. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$30,587.05 net income for victory tax purposes.

62. A statement of the dates and amounts of payments made by defendant Sam Ormont on account of the alleged tax of \$13,461.29.

63. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$13,461.29, by payments made by the defendant Sam Ormont.

64. A statement of the portion, if any, of the alleged tax of \$13,461.29 which was unpaid at the time said Indictment was rendered.

65. Facts and figures showing the basis of the figure of \$14,423.42, which is alleged in Count Four

of said [45] Indictment was defendant Sam Ormont's "Net income for the said calendar year" of 1942.

66. An itemized statement of the various items, sums and figures used by said plaintiff in determining that Sam Ormont's net income for the calendar year of 1942 was the sum of \$14,423.42, as alleged in the said Count Four of said Indictment.

67. An itemized statement of the sources from which derived, and the several amounts and the various items comprising and forming the basis for the sum of \$14,423.42, and of each component part thereof, alleged to be the net income of defendant Sam Ormont for 1942, as set forth in said Count Four of said Indictment.

68. An itemization of the portion of said alleged \$14,423.42 alleged in said Count Four, which constituted the net income for the calculation of defendant Sam Ormont's "Normal Tax" as provided in Section 11 of Chapter 1 of the Internal Revenue Code.

69. An itemization of the portion of the \$14,423.42 alleged in said Count Four, which constituted the "surtax net income" of defendant Sam Ormont for the year 1942, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

70. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Sam Ormont's "net income for the said calendar year was the sum of \$14,423.42", in said Count Four.

71. Facts, figures, items and sources showing the "gross income" of defendant Sam Ormont for said year 1942, from which plaintiff determined and alleges that "his net income for the said calendar year was the sum of \$14,423.42." [46]

72. Facts, figures, items and nature of credits and deductions, if any, made from such "gross income" before calculating, determining and alleging the "net income" subject to "normal tax", and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "surtax net income."

73. Facts and figures showing the basis of the alleged income tax of defendant Sam Ormont in the total sum of \$3875.84, as alleged in said Count Four of said Indictment.

74. Facts and figures showing the credits and deductions, if any, made and credited, on said \$14,423.42 before calculating the "normal income tax" in the sum of \$3875.84, alleged in said Count Four.

75. Facts and figures showing the credits and deductions, if any, made and credited, on said \$14,423.42 before calculating the "surtax".

76. Facts and figures showing the "net income" which was subject to the "Normal Tax", and facts and figures showing the "surtax net income."

77. Facts and figures showing what part or portion of the alleged \$3875.84 which it is alleged that defendant Sam Ormont owed the United States of America as income tax for said year 1942, is "Normal Tax", and what portion is "Surtax".

78. A statement of dates and amounts of payments made by defendant Sam Ormont on account of the income tax on the said items comprising said \$14,423.42 alleged net income.

79. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account [47] of the items, or any of them, comprising the alleged \$14,423.42 net income.

80. A statement of the dates and amounts of payments made by this defendant Sam Ormont on account of the alleged tax of \$3875.84.

81. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$3875.84, by payments made by defendant Sam Ormont.

82. A statement of the portion, if any, of the alleged tax of \$3875.84 which was unpaid at the time said Indictment was rendered.

Said Motion is made and based upon the ground that said Indictment is uncertain and it is impossible to determine therefrom the basis of the figures alleged in said Indictment to constitute the "net income" or "net incomes" or the "tax due" or "taxes due", nor how or in what manner such figures were determined, and this defendant cannot properly plead to or prepare or present his defense to said Indictment and the several counts, thereof without the Bill of Particulars of the various items herein requested; and if compelled to go to trial without such Bill of Particulars, he will be taken by surprise when the evidence is presented by the plaintiff, and will not have sufficient time or opportunity to pre-

pare and present his defense in said case, and will not have sufficient time to examine and determine the correctness or incorrectness of the plaintiff's figures and calculations and basis of such figures and calculations.

Wherefore, this defendant prays that this Motion be granted and an order made accordingly.

DALY B. ROBNETT and

BENJAMIN F. KOSDON,

By /s/ DALY B. ROBNETT,

Attorneys for Defendant

Phillip Himmelfarb.

Notice of Hearing

To James M. Carter, United States Attorney:

You are hereby notified that the undersigned, attorneys for the defendant named in the foregoing Motion, will present said Motion to the above-entitled court on Monday, the 10th day of February, 1947, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard.

Dated February 3, 1947.

DALY B. ROBNETT and

BENJAMIN F. KOSDON,

By /s/ DALY B. ROBNETT,

Attorneys for said defendant.

Received copy of the foregoing Motion and Notice of Hearing, this 3d day of February, 1947.

JAMES M. CARTER,

By /s/ WILLIAM STRONG,

Asst. United States Attorney.

[Endorsed]: Filed Feb. 3, 1947. [49]

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes now the defendant, Sam Ormont, by his attorneys, Daly B. Robnett and Benjamin F. Kosdon, and moves the Court for an order requiring the United States of America, plaintiff, to furnish said defendant Sam Ormont, within a time to be therein specified, a written Bill of Particulars, in the above-entitled case, as to the following matters alleged in the Indictment herein to-wit:

1. Facts and figures showing the basis of the figure of \$36,982.52, which it is alleged in Count One of said Indictment was said defendant's "Net income for the said calendar year . . . for income tax purposes."

2. An itemized statement of the various items, sums and figures used by said plaintiff in determining that this defendant's net income for the calendar year of 1944 was the sum of \$36,982.52 for income tax purposes, as alleged in the said Count One of said Indictment.

3. An itemized statement of the sources from which derived, [50] and the several amounts and the various items comprising and forming the basis for the sum of \$36,982.52, and of each component part thereof, alleged to be the net income of this defendant for 1944, as set forth in said Count One of said Indictment.

4. An itemization of the portion of said alleged \$36,982.52 alleged in said Count One, which consti-

tuted the net income for the calculation of this defendant's "Normal Tax" as provided in Section 11 of Chapter 1 of Internal Revenue Code, as amended by "Individual Income Tax Act of 1944."

5. An itemization of the portion of the \$36,982.52 alleged in said Count One, which constituted the "surtax net income" of this defendant for the year 1944, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

6. An itemization of the portion of the \$36,982.52 alleged in said Count One, which constituted the "Victory Tax Net Income" alleged in said Count One of said Indictment.

7. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that this defendant's "net income for the said calendar year was the sum of \$36,982.52 for income tax purposes," in said Count One.

8. Facts, figures, items and sources showing the "gross income" of said defendant for said year 1944, from which plaintiff determined and alleges that "his net income for the said calendar year was the sum of \$36,982.52 for income tax purposes."

9. Facts, figures, items and nature of credits and deductions, if any, made from such "gross income" before [51] calculating, determining and alleging the "net income" subject to "normal tax", and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "surtax net income" and likewise the

credits and deductions, if any, made from such "gross income" before calculating and determining the "Victory Tax Net Income."

10. Facts and figures showing the basis of the alleged income tax of this defendant in the total sum of \$18,143.12, as alleged in said Count One of said Indictment.

11. Facts and figures showing the credits and deductions, if any, made and credited, on said \$36,982.52 before calculating the "normal income tax" in the sum of \$18,143.12 alleged in said Count One.

12. Facts and figures showing the credits and deductions, if any, made and credited, on said \$36,982.52 before calculating the "surtax".

13. Facts and figures showing the credits and deductions, if any, made and credited, on said \$36,982.52, before calculating the alleged "Victory Tax".

14. Facts and figures showing the "net income" which was subject to the "Normal Tax"; and the facts and figures showing the "surtax net income"; and facts and figures showing the "Victory Tax net income."

15 Facts and figures showing what part or portion of the alleged \$18,143.12 which it is alleged this defendant owed the United States of America as income tax for said year 1944, is "Normal Tax", and what portion is "Surtax", and what portion is alleged "Victory Tax".

16. A statement of dates and amounts of payments made by this defendant on account of the income tax on the said items comprising said \$36,982.52 alleged net [52] income.

17. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$36,982.52 net income.

18. A statement of the dates and amounts of payments made by this defendant on account of the alleged tax of \$18,143.52.

19. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$18,143.52, by payments made by this defendant.

20. A statement of the portion, if any, of the alleged tax of \$18,143.52 which was unpaid at the time said Indictment was rendered.

21. Facts and figures showing the basis of the figure of \$17,752.65, which it is alleged in Count Two of said Indictment was defendant Phillip Himmelfarb's "Net income for the said calendar year."

22. An itemized statement of the various items, sums and figures used by said Plaintiff in determining the defendant Phillip Himmelfarb's net income for the calendar year of 1944 was the sum of \$17,752.65 for income tax purposes, as alleged in the said Count Two of said Indictment.

23. An itemized statement of the sources from which derived, and the several amounts and the various items comprising and forming the basis for the sum of \$17,752.65, and of each component part thereof, alleged to be the net income of defendant Phillip Himmelfarb for 1944, as set forth in said Count Two of said Indictment.

24. An itemization of the portion of said alleged \$17,752.65 [53] alleged in said Count Two, which constituted the net income for the calculation of defendant Phillip Himmelfarb's "Normal Tax" as provided in Section 11 of Chapter 1 of the Internal Revenue Code, as amended by "Individual Income Tax Act of 1944."

25. An itemization of the portion of the \$17,752.65 alleged in said Count Two, which constituted the "surtax net income" of defendant Phillip Himmelfarb for the year 1944, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

26. An itemization of the portion of the \$17,752.65 alleged in said Count Two, which constituted the "Victory Tax Net Income" alleged in said Count Two of said indictment.

27. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Phillip Himmelfarb's "net income for the said calendar year was the sum of \$17,752.65", in said Count Two.

28. Facts, figures, items and sources showing the "gross income" of defendant Phillip Himmelfarb

for said year 1944, from which plaintiff determined and alleges that "his net income for said calendar year was the sum of \$17,752.65."

29. Facts, figures, items and nature of credits and deductions, if any, made from such "gross income" before calculating, determining and alleging the "net income" subject to "normal tax", and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "surtax net income" and likewise the credits and deductions, if any, made from such "gross income" before calculating and [54] determining the "Victory Tax Net Income."

30. Facts and figures showing the basis of the alleged income tax of defendant Phillip Himmelfarb in the total sum of \$5843.91, as alleged in said Count Two of said Indictment.

31. Facts and figures showing the credits and deduction, if any, made and credited, on said \$17,752.65 before calculating the "normal income tax" in the sum of \$5843.91 alleged in said Count Two.

32. Facts and figures showing the credits and deductions, if any, made and credited, on said \$17,752.65 before calculating the "surtax."

33. Facts and figures showing the credits and deductions, if any, made and credited, on said \$17,752.65, before calculating the alleged "Victory Tax".

34. Facts and figures showing the "net income" which was subject to the "Normal Tax"; and facts

and figures showing the "surtax net income"; and facts and figures showing the "Victory Tax net income."

35. Facts and figures showing what part or portion of the alleged \$5843.91 which it is alleged that defendant Phillip Himmelfarb owed the United States of America as income tax for said year 1944, is "Normal Tax", and what portion is "Surtax", and what portion is alleged "Victory Tax".

36. A statement of dates and amounts of payments made by defendant Phillip Himmelfarb on account of the income tax on the said items comprising said \$17,752.65 alleged net income.

37. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged [55] \$17,752.65 net income.

38. A statement of the dates and amounts of payments made by this defendant Phillip Himmelfarb on account of the alleged tax of \$5843.91.

39. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$5843.91, by payments made by defendant Phillip Himmelfarb.

40. A statement of the portion, if any, of the alleged tax of \$5843.91, which was unpaid at the time said Indictment was rendered.

41. Facts and figures showing the basis of the figure of \$30,512.86, which it is alleged in Count Three of said Indictment was defendant Sam Ormont's "Net income for the calendar year 1943 . . . for income tax purposes."

42. Facts and figures showing the basis of the figure of \$30,587.05, which it is alleged in said Count Three was defendant Sam Ormont's "Net income for the said calendar year . . . for victory tax purposes."

43. An itemized statement of the various items, sums and figures used by said plaintiff in determining that defendant Sam Ormont's net income for the calendar year of 1943 was the sum of \$30,512.86 for income tax purposes, as alleged in the said Count Three of said Indictment.

44. An itemized statement of the various items, sums and figures used by said plaintiff in determining that defendant Sam Ormont's net income for the calendar year of 1943 was the sum of \$30,587.05 for Victory Tax purposes, as alleged in the said Count Three of said Indictment.

45. An itemized statement of the sources from which derived, and the several amounts and the various items comprising [56] and forming the basis for the sum of \$30,512.86, and of each component part thereof, alleged to be the net income of defendant Sam Ormont for 1943 for income tax purposes, as set forth in said Count Three of said Indictment.

46. An itemized statement of the sources from which derived, and the several amounts and the various items comprising and forming the basis for the sum of \$30,587.05, and of each component part thereof, alleged to be the net income of defendant Sam Ormont for 1943 for Victory Tax purposes, as set forth in said Count Three of said Indictment.

47. An itemization of the portion of said alleged \$30,512.86 alleged in said Count Three, which constituted the net income for the calculation of defendant Sam Ormont's "Normal Tax" as provided in Section 11 of Chapter 1 of the Internal Revenue Code, as amended by "Individual Income Tax Act of 1943."

48. An itemization of the portion of the \$30,512.86 alleged in said Count Three, which constituted the "surtax net income" of defendant Sam Ormont for the year 1943, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

49. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Sam Ormont's "net income for the said calendar year was the sum of \$30,512.86 for income tax purposes," said Count Three.

50. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Sam Ormont's "net income for said calendar year was the sum of \$30,587.05 for victory tax purposes," in [57] said Count Three.

51. Facts, figures, items and sources showing the "gross income" of defendant Sam Ormont for said year 1943, from which plaintiff determined and alleges that "his net income for the said calendar year was the sum of \$30,512.86 for income tax purposes."

52. Facts, figures, items and nature of credits and deductions, if any, made from such "gross

income" before calculating, determining and alleging the "net income" subject to "normal tax", and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "surtax net income", and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "Victory Tax Net Income."

53. Facts and figures showing the basis of the alleged income tax of defendant Sam Ormont in the total sum of \$13,461.29, as alleged in said Count Three of said Indictment.

54. Facts and figures showing the credits and deductions, if any, made and credited, on said \$30,512.86 before calculating the "normal income tax" in the sum of \$13,461.29 alleged in said Count Three.

55. Facts and figures showing the credits and deductions, if any, made and credited, on said \$30,512.86 before calculating the "surtax".

56. Facts and figures showing the "net income" which was subject to the "Normal Tax"; and facts and figures showing the "surtax net income"; and facts and figures showing the "Victory Tax net income."

57. Facts and figures showing what part or portion of the alleged \$13,461.29 which it is alleged defendant Sam Ormont [58] owed the United States of America as income and victory tax for said year 1943, is "Normal Tax", and what portion is "Surtax", and what portion is alleged "Victory Tax".

58. A statement of dates and amounts of payments made by defendant Sam Ormont on account of the income tax on the said items comprising said \$30,512.86 alleged net income for income tax purposes.

59. A statement of dates and amounts of payments made by defendant Sam Ormont on account of the victory tax on the said items comprising said \$30,587.05 alleged net income for victory tax purposes.

60. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$30,512.86 net income for income tax purposes.

61. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$30,587.05 net income for victory tax purposes.

62. A statement of the dates and amounts of payments made by defendant Sam Ormont on account of the alleged tax of \$13,461.29.

63. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$13,461.29, by payments made by the defendant Sam Ormont.

64. A statement of the portion, if any, of the alleged tax of \$13,461.29 which was unpaid at the time said Indictment was rendered.

65. Facts and figures showing the basis of the figure of \$14,423.42, which it is alleged in Count Four of said Indictment was defendant Sam Ormont's "Net income for the said calendar year" of 1942. [59]

66. An itemized statement of the various items, sums and figures used by said plaintiff in determining that Sam Ormont's net income for the calendar year of 1942 was the sum of \$14,423.42, as alleged in the said Count Four of said Indictment.

67. An itemized statement of the sources from which derived, and the several amounts and the various items comprising and forming the basis for the sum of \$14,423.42, and of each component part thereof, alleged to be the net income of defendant Sam Ormont for 1942, as set forth in said Count Four of said Indictment.

68. An itemization of the portion of said alleged \$14,423.42 alleged in said Count Four, which constituted the net income for the calculation of defendant Sam Ormont's "Normal Tax" as provided in Section 11 of Chapter 1 of the Internal Revenue Code.

69. An itemization of the portion of the \$14,423.42 alleged in said Count Four, which constituted the "surtax net income" of defendant Sam Ormont for the year 1942, as provided in Section 12 (a) of Chapter 1 of the Internal Revenue Code, and amendments thereto.

70. Facts, figures, items and sources showing the basis upon which plaintiff determined and alleges that defendant Sam Ormont's "net income for the said calendar year was the sum of \$14,423.42", in said Count Four.

71. Facts, figures, items and sources showing the "gross income" of defendant Sam Ormont for said year 1942, from which plaintiff determined and alleges that "his net income for the said calendar year was the sum of \$14,423.42."

72. Facts, figures, items and nature of credits and deductions, if any, made from such "gross income" before [60] calculating, determining and alleging the "net income" subject to "normal tax". and likewise the credits and deductions, if any, made from such "gross income" before calculating and determining the "surtax net income."

73. Facts and figures showing the basis of the alleged income tax of defendant Sam Ormont in the total sum of \$3875.84, as alleged in said Count Four of said Indictment.

74. Facts and figures showing the credits and deductions, if any, made and credited, on said \$14,423.42 before calculating the "normal income tax" in the sum of \$3875.84, alleged in said Count Four.

75. Facts and figures showing the credits and deduction, if any, made and credited, on said \$14,423.42 before calculating the "surtax".

76. Facts and figures showing the "net income" which was subject to the "Normal Tax", and facts and figures showing the "surtax net income."

77. Facts and figures showing what part or portion of the alleged \$3875.84 which it is alleged that defendant Sam Ormont owed the United States of America as income tax for said year 1942, is "Normal Tax", and what portion is "Surtax".

78. A statement of dates and amounts of payments made by defendant Sam Ormont on account of the income tax on the said items comprising said \$14,423.42 alleged net income.

79. A statement of the dates and amounts of credits for payments to the Collector of Internal Revenue, on account of the items, or any of them, comprising the alleged \$14,423.42 net income. [61]

80. A statement of the dates and amounts of payments made by this defendant Sam Ormont on account of the alleged tax of \$3875.84.

81. A statement of the dates and amounts of credits, if any, which plaintiff made on said alleged tax of \$3875.84, by payments made by defendant Sam Ormont.

82. A statement of the portion, if any, of the alleged tax of \$3875.84 which was unpaid at the time said Indictment was rendered.

Said motion is made and based upon the ground that the said Indictment is uncertain and it is impossible to determine therefrom the basis of the

figures alleged in said Indictment to constitute the "net income" or "net incomes" or the "tax due" or "taxes due," nor how or in what manner such figures were determined, and this defendant cannot properly plead to or prepare or present his defense to said Indictment and the several counts thereof without the Bill of Particulars of the various items herein requested; and if compelled to go to trial without such Bill of Particulars, he will be taken by surprise when the evidence is presented by the plaintiff, and will not have sufficient time or opportunity to prepare and present his defense in said case, and will not have sufficient time to examine and determine the correctness or incorrectness of the plaintiff's figures and calculations and basis of such figures and calculations.

Wherefore, this defendant prays that this Motion be granted and an order made accordingly.

DALY B. ROBNETT and
BENJAMIN F. KOSDON,

By /s/ DALY B. ROBNETT,
Attorneys for Defendant
Sam Ormont.

Notice of Hearing

To James M. Carter, United States Attorney:

You are hereby notified that the undersigned, attorneys for the defendant named in the foregoing Motion, will present said Motion to the above-entitled court on Monday, the 10th day of February, 1947, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard.

Dated February 3, 1947.

DALY B. ROBNETT and
BENJAMIN F. KOSDON,

By /s/ DALY B. ROBNETT,
Attorneys for said defendant.

Received copy of the foregoing Motion and
Notice of Hearing, this 3rd day of February, 1947.

JAMES M. CARTER,
By /s/ WILLIAM STRONG,
Asst. United States Attorney.

[Endorsed]: Filed Feb. 3, 1947. [63]

At a stated term, to-wit: The February term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of Southern California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 12th day of March in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Wm. C. Mathes,
District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO DISMISS

This cause coming on for hearing motion to dismiss and motion for a Bill of Particulars; Wm. Strong, Assistant U. S. Attorney, appearing as counsel for the Government; Daly B. Robnett, and Benj. F. Kosdon, Esqs., appearing as counsel for the defendants Sam Ormont and Phillip Himmelfarb, who are both present; it is ordered that motion to dismiss as to each defendant is denied.

Motion for a Bill of Particulars is presented on authorities filed; Attorney Strong replies to the Court's questions; and motion of Defendant Ormont for a Bill of Particulars is granted and that the same be furnished in ten days, the said order being as follows: * * *

It is ordered that the cause is hereby continued to March 28, 1947, at 10 a.m., for plea.

[Title of District Court and Cause.]

ORDER ON MOTIONS OF DEFENDANTS TO
DISMISS THE INDICTMENT AND FOR A
BILL OF PARTICULARS

This cause having heretofore come before the court for hearing on separate motions of the defendants to dismiss the indictment and for a bill of particulars, and the motions having been heard and submitted for decision,

It Is Now Ordered:

(1) That the motion of defendant Sam Ormont to dismiss the indictment be and is hereby denied;

(2) That the motion of defendant Sam Ormont for a bill of particulars be and is hereby granted to the extent that plaintiff is hereby required to furnish defendant Sam Ormont, within ten days from the date of this order, a bill of particulars setting forth (a) the claimed true amount of defendant Sam Ormont's "gross income" for the calendar years 1942, 1943 and 1944; (b) an itemization of the allowable credits and deductions, if any, claimed to be [65] properly deductible from the alleged true "gross income" in determining the alleged true "net income" of defendant Sam Ormont, subject to "normal tax", "surtax" and "Victory Tax" for the calendar years 1942, 1943 and 1944; and (c) an itemization of the allowable credits and deductions and exemptions, if any, claimed to be properly deductible from the alleged true "net income" for Federal income tax purposes for the

calendar years 1942, 1943 and 1944 in determining the alleged true amount of Federal income tax due the United States of America by defendant Sam Ormont for the calendar years 1942, 1943 and 1944.

(3) That the motion of defendant Sam Ormont for a bill of particulars be and is hereby in all other respects denied.

(4) That the motion of defendant Phillip Himmelfarb to dismiss the indictment be and is hereby denied:

(5) That the motion of defendant Phillip Himmelfarb for a bill of particulars be and is hereby granted to the extent that plaintiff is hereby required to furnish defendant Phillip Himmelfarb, within ten days from the date of this order, a bill of particulars setting forth (a) the claimed true amount of defendant Phillip Himmelfarb's "gross income" for the calendar year 1944; (b) an itemization of the allowable credits and deductions, if any, claimed to be properly deductible from the alleged true "gross income" in determining the alleged true "net income" of defendant Phillip Himmelfarb, subject to "normal tax", "surtax" and "Victory Tax" for the calendar year 1944; and (c) an itemization of the allowable credits and deductions and exemptions, if any, claimed to be properly deductible from the alleged true "net income" for Federal income tax purposes for the calendar year 1944 in determining the alleged true amount of Federal income tax due the United States of America by [66] defendant Phillip Himmelfarb for the calendar year 1944.

(6) That the motion of defendant Phillip Himmelfarb for a bill of particulars be and is hereby in all other respects denied.

Done in open court March 12, 1947.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed March 12, 1947. [67]

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes now the plaintiff, the United States of America, by its attorneys James M. Carter, United States Attorney, and Howard V. Calverly and William Strong, Assistant United States Attorneys, and furnishes the within particulars in conformance with the order of the Honorable William C. Mathes, dated March 12, 1947:

I.

Sam Ormont—year ending December 31, 1942

	Income Tax, net Income
True gross income.....	\$15,039.83
Allowable deductions	616.41
Net income	\$14,423.42
Personal exemption (head of family).....	\$ 1,200.00
Surtax net income.....	13,223.42
Earned income credit.....	300.00
Balance subject to normal tax.....	\$12,923.42

II.

Sam Ormont—year ending December 31, 1943

	Income tax net Income	Victory tax net Income
True gross income.....	\$31,122.92	\$30,937.05
Allowable deductions	610.06	350.00
	<hr/>	<hr/>
	\$30,512.86	\$30,587.05
Personal exemption.....	1,200.00	
	<hr/>	
Surtax net income.....	\$29,312.86	
Earned income credit.....	300.00	
	<hr/>	
Balance subject to normal tax.....	\$29,012.86	
Specific exemption for Victory tax.....		624.00
		<hr/>
Income subject to victory tax.....		\$29,693.05

III.

Sam Ormont—year ending December 31, 1944

True gross income.....	\$37,482.52
Allowable deductions	500.00
	<hr/>
True net income.....	\$36,982.52
Surtax exemption	1,000.00
	<hr/>
Surtax net income.....	\$35,982.52
	<hr/>
True net income as above.....	\$36,982.52
Normal tax exemption	500.00
	<hr/>
Normal tax net income.....	\$36,482.52
	<hr/>

IV.

Phillip Himmelfarb—year ending December 31, 1944

	Phillip Himmelfarb	Ruth Himmelfarb	Joint Phillip & Ruth
True gross income.....	\$18,252.65	\$18,252.64	\$36,505.29
Allowable deductions.....	500.00	500.00	1,000.00
True net income.....	\$17,752.65	\$17,752.64	\$35,505.29
Surtax exemptions	1,500.00	1,000.00	2,500.00
Surtax net income.....	\$16,252.65	\$16,752.64	\$33,005.29
True net income.....	\$17,752.65	\$17,752.64	\$35,505.29
Normal tax exemption	500.00	500.00	1,000.00
Normal tax net income.....	\$17,252.65	\$17,252.64	\$34,505.29

The within particulars are furnished by the plaintiff with no restriction upon the rights of the plaintiff to prove such further and other facts as appear necessary in the trial of this cause.

Respectfully submitted,

JAMES M. CARTER,

United States Attorney.

HOWARD V. CALVERLY,

Assistant U. S. Attorney,

Chief, Criminal Division.

WILLIAM STRONG,

Assistant U. S. Attorney.

Attorneys for Plaintiff.

By /s/ WILLIAM STRONG,

Assistant U. S. Attorney.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 21, 1947.

As a stated term, to wit: The February Term, A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 28th day of March in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Wm. C. Mathes,
District Judge.

[Title of Cause.]

MINUTE ORDER, MARCH 28, 1947

This cause coming on for plea of both defendants Sam Ormont and Phillip Himmelfarb; Wm. Strong, Assistant U. S. Attorney, appearing as counsel for the Government; Daly B. Robnett and Benj. F. Kosdon, Esqs., appearing as counsel for the said defendants, who are present; all having been present at 10 a. m.; defendants request that pleas be taken now; and counsel for defendants having waived reading of the Indictment, Defendant Ormont pleads not guilty to counts 1, 3 and 4 and guilty to count 2, and Defendant Himmelfarb pleads not guilty to counts 1, 2. Attorney Robnett suggests a continuance until April 15, 1947.

It is ordered that the cause is hereby set for trial on May 13, 1947, at 10 a. m., before Judge Weinberger. [72]

In the District Court of the United States in and for
the Southern District of California, Central
Division

No. 19138 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
Defendants.

and

No. 19094 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
dba ACME MEAT COMPANY,
Defendants.

MOTION TO CONSOLIDATE CASES
FOR TRIAL

To: Daly B. Robnett and Benjamin F. Kosdon,
Attorneys for Defendants, 1007 Spring Arcade
Building, 541 S. Spring St., Los Angeles 13,
Calif.:

Please Take Notice that on May 13, 1947, at 10:00
a. m., or as soon thereafter as the matter can be
heard, a motion will be made before the Honorable
Jacob Weinberger, Judge of the District Court of

the United States, for the Southern District of California, to consolidate the above cases for trial.

JAMES M. CARTER,
United States Attorney.

HOWARD V. CALVERLY and
WILLIAM STRONG,
Asst. U. S. Attorneys.

By /s/ WILLIAM STRONG,
Assistant U. S. Attorney.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 2, 1947.

[Title of District Court and Causes.]

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO CONSOLIDATE FOR
TRIAL THE ABOVE CAUSES OF ACTION

Rule 13 of the Rules of Criminal Procedure provides:

“The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.”

Rule 8 provides:

“(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment

or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

“This rule is substantially a restatement of existing law, 18 U. S. C. 557 (Indictments and presentments; joinder of charges).

“(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.”

18 U. S. C. A. § 557 provides as follows:

“Same; joinder of charges. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated. (R. S. § 1024).”

It would serve no useful purpose to cite extensively from the numerous authorities and cases which permit the consolidation of indictments for trial in this case.

Obviously the different offenses charged in each of the two indictments here could have all been joined in one indictment. The defendants are the same in all of the counts in each of the indictments, and the offenses [76] arise out of almost precisely the same series of transactions and facts.

The proof as to each of the indictments would be almost precisely the same. Evidence which discloses the commission of the offenses with reference to overcharges for sales of meat in violation of the Emergency Price Control Act will be presented in support of the conspiracy count, charging a conspiracy to violate the Emergency Price Control Act. In proof of both the substantive violations and the conspiracy in that respect evidence as to the income of the defendants, the income tax returns and income tax disclosures will also be offered.

In support of the income tax evasion indictment, the same evidence will be used to prove that the defendants earned the sums which the Government charges them with having received, and that they unlawfully failed to make proper disclosures of their income and pay the proper tax.

We do not wish to burden this Court with extensive reading of applicable authorities, which are collected in considerable detail in 18 U. S. C. A. § 557.

Manifestly, in this instance, consolidation of the indictments for trial is not only wholly proper, but constitutes the most feasible and only practical course of trying these defendants. The consolidation is within the discretion of the trial court: Since both defendants are charged in each count of both indictments, since the offenses charged are "of the same or similar character," are based substantially "on the same act or transaction," and are manifestly "two or more acts or transactions connected together or constituting parts of a common scheme or plan" (see Rule 8, *supra*). The requirement of Rule 13, which permits the trial of indictments together "if the offenses, and the defendants * * * could have been joined in a single indictment * * *" has been fully met.

Separate trials under each of the indictments would produce unnecessary delay, waste of time, and waste of money, since the second trial would in effect be a complete repetition of the first. [77]

It is respectfully submitted that the Government's motion for consolidation of the two above-mentioned indictments for trial should be granted.

Respectfully submitted,

JAMES M. CARTER,

United States Attorney.

By /s/ WILLIAM STRONG,

Assistant U. S. Attorney.

Attorneys for Plaintiff.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 9, 1947. [78]

At a stated term, to wit: The February Term, A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 14th day of May in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Jacob Weinberger,
District Judge.

[Title of Causes.]

ORDER DENYING CONSOLIDATION

These causes coming on for ruling on motion of plaintiff filed May 2, 1947, to consolidate cases Nos. 19,094-Crim. and 19,138-Crim.; T. G. Klinger, Assistant U. S. Attorney, appearing as counsel for the Government; Benjamin F. Kosdon and Daly B. Robnett, Esqs, appearing as counsel for the defendants, who are both present on bond:

William Katz, Esq., appears and states Defendant Himmelfarb has consulted with him and that the said defendant desires separate counsel, and that a formal substitution will be filed substituting new counsel, which may or may not be William Katz, Esq., but that the said defendant wishes Attorney Katz to appear for him at this time. Attorney Robnett states he has no objection and the Court approves the said substitution and relieves Messrs Robnett and Kosdon from representing Defendant Himmelfarb further.

The Court makes a statement of its views and it is ordered that the motion to consolidate is hereby denied.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 19138

Sec. 145(b) Internal Revenue Code;
26 U. S. C. 145(b)

UNITED STATES OF AMERICA,
Plaintiff,
vs.

SAM ORMONT and PHILLIP HIMMELFARB,
Defendants.

INSTRUCTIONS REQUESTED BY THE
DEFENDANT SAM ORMONT

The defendant Sam Ormont hereby requests the
Court to give the jury the following instructions.

BENJAMIN F. KOSDON and
DALY B. ROBNETT,

By /s/ DALY B. ROBNETT,
Attorneys for Defendant.

7/13/47.

Refused or covered.

PEIRSON M. HALL,
Judge.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that the defendant is not
charged with concealing or attempting to conceal
the gross or net income received by him, or the

sources thereof, but with willfully attempting to defeat and evade income tax. Therefore, if you find from the evidence that the defendant did not attempt to evade the income tax due or owing by him, you must find the defendant not guilty, irrespective of whether the defendant did or did not conceal or attempt to conceal the true and correct gross or net income received by him.

Section 145(b), Internal Revenue Code, 26 U.S.C. 145 (b); *Spies v. U. S.*, 317 U. S. 492.

Requested by Jury Instruction No. X12
of Defendant Sam Ormont

To establish its case, the Government must prove not only an attempt by the defendants wilfully to defraud it, but also that a tax in addition to what the defendants had already paid remains due and owing.

U. S. vs. Schenck, 126 Fed (2d) 702;
Gleckman vs. U. S., 80 Fed (2d) 394;
Tinkoff vs. U. S., 86 Fed (2d) 868;
Hargrove vs. U. S., 67 Fed (2d) 820;
Rose vs. U. S., 128 Fed. (2d) 820;
Rose vs. U. S., 128 Fed (2d) 622 and 626.

Requested Jury Instruction No. X10
of Defendant Sam Ormont

You are instructed that if you find from the evidence that defendant Sam Ormont paid all or a substantial part of the income tax due and owing by him for the calendar year 1944 or paid an amount

in excess of the income tax due and owing by him for the calendar year 1944, you must find the defendant Sam Ormont not guilty of Count 1 of the indictment.

Section 145(b) Internal Revenue Code, 26
U. S. C. 145(b);

Gleckman vs. U. S., 80 F. (2d) 394, 297
U. S. 709;

U. S. vs. Schenck, 126 F. (2d) 702, 316 U.
S. 705;

Rose vs. U. S., 128 F. (2d) 622, 317 U. S. 651.

Requested Jury Instruction No. 2
of Defendant Sam Ormont

You are instructed that the law presumes the acts of all men have been rightfully, properly and honestly performed, and that the acts shown by the evidence to have been performed by the defendant were performed properly and honestly and by reason of honest and proper motives, unless the contrary is established to your satisfaction beyond a reasonable doubt.

Requested Jury Instruction No.
of Defendant Sam Ormont

You are instructed to return a verdict of Not Guilty as to Count One of said indictment.

Requested Jury Instruction No. 2
of Defendant Sam Ormont

Reasonable doubt

You are instructed that the law does not require any defendant to prove his innocence, which in

many cases might be impossible, but on the contrary, the law requires the Government to establish any such guilt by legal evidence and beyond a reasonable doubt. The presumption of innocence goes with the defendant throughout the whole trial, and such presumption outweighs and overbalances all suspicions and suppositions and can only be destroyed by proof of guilt beyond a reasonable doubt.

You are instructed that the presumption of innocence with which the defendant is at all times clothed, is not a mere form to be destroyed by you at pleasure, but that it is an essential substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full benefit of this presumption and to acquit the defendant unless the evidence in the case convinces you of his guilt as charged, beyond a reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty. You cannot find the defendant guilty unless, from all the evidence, you believe him guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but

if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

By such reasonable doubt, you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and to justify a conviction the probabilities must be so strong as not to exclude all doubt or possibility of error, but such as to exclude reasonable doubt.

When, weighing all the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the evidence or facts.

Reasonable doubt is not mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Requested Jury Instruction No.....
of Defendant Sam Ormont

It is your duty to try this case fairly and impartially between the government and the defendant, upon the evidence before you, and upon that alone. You must not permit any prejudice to enter into your deliberation as to the guilt or innocence of the defendant. The nature of the charge should not be permitted by you to influence your judgment one way or the other as to whether or not the defendant is guilty as charged. Our law presumes every person charged with crime innocent until proven guilty, and no person can be found guilty of any offense unless his guilt is first established to a moral certainty and an abiding conviction and beyond all reasonable doubt.

Requested Jury Instruction No.....
of Defendant Sam Ormont

The mere fact that an indictment has been filed charging the defendant with a crime does not itself raise any presumption or inference as to the guilt of the defendant. The mere fact that he has been brought into court by the ordinary criminal process and is here on trial, should not be considered by you as any evidence whatsoever of his guilt.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that the defendant in this case is entitled to the individual opinion of each

member of this jury and that no member of this jury should vote for a conviction of the defendant because of the opinion of the other members of the jury so long as he has a reasonable doubt as to the guilt of the defendant.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that the presumption of innocence is not a mere matter of form, to be disregarded by you at your pleasure, but is an essential, substantial part of the law of the land, and binding upon you in this case, and it is your duty to give the defendants the full benefit of this presumption and to acquit him, unless the evidence in the case convinces you beyond all reasonable doubt of the guilt of the defendant.

Requested Jury Instruction No.....
of Defendant Sam Ormont

The jury is instructed that each essential independent fact necessary to complete a chain or series of independent facts tending to establish a presumption of guilt, should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact, must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances must all concur to show that the defendant com-

mitted the crime charged and must all be inconsistent with any other rational conclusion and must exclude to a moral certainty and to the entire satisfaction of the jury and other hypothesis but the single one of guilt.

Requested Jury Instruction No.....
of Defendant Sam Ormont

It is a recognized principle of our system of law that in order to convict a defendant, the facts proven must not only be consistent with the theory of guilt, but inconsistent with any reasonable theory of innocence, and this I charge is the law.

Requested Jury Instruction No.....
of Defendant Sam Ormont

It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty and the law requires you to, if you can reasonably do so, reconcile any and all circumstances that have been shown with the innocence of the defendant, and so acquit him.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that where two or more equally reasonable inferences may be drawn from a fact shown, that inference leading to a conclusion of innocence should be accepted, rather than one leading to a conclusion of guilt.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that if one set or chain of circumstances leads to two opposing conclusions, one pointing to the guilt, the other to the innocence of the defendant, and the jury has any reasonable doubt as to which of such conclusions the chain of circumstances leads, a reasonable doubt is thereby created, and the defendant should be acquitted.

Requested Jury Instruction No.....
of Defendant Sam Ormont

It is the duty of the jury to enter upon the consideration of each circumstance proven, having in their minds the presumption that defendants are innocent, and in considering each fact or circumstance they should apply it to a presumption of innocence, and if such factor circumstance, when considered with all the evidence in the case, can be explained consistently with innocence, it is their duty to so explain it.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You cannot base a verdict of guilt upon extra judicial oral admissions, or statements of a defendant alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti, and if you do not believe after a considera-

tion of all the evidence that the body of the crime or the corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that evidence of a defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations and may of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that under the Internal Revenue law, a partnership or a joint venture may elect what is known as a fiscal year, consisting of any period not exceeding twelve months other than the calendar year, for calculating, reporting and paying income tax, and in the event of such election and establishment of a fiscal year which does not conform to the calendar year, the persons constituting such partnership or joint venture are not required to pay for the income from such partnership or joint venture until the 15th day of March of the calendar year following the last day of such fiscal year. For instance, if you should find from the evidence in this case that the defendants were

co-partners or joint venturers and from such co-partnership or joint venture derived an income, and if you further find that such co-partnership or joint venture had elected to pay under a fiscal year commencing on May 1, 1944 and ending on April 30, 1945, then and in that event the said defendants were not required to pay the income tax on the income from such partnership or joint venture for said fiscal year until on or before the 15th day of March, 1946.

Requested Jury Instruction No.....
of Defendant Sam Ormont

If you find from the evidence in this case that defendant Sam Ormont, prior to the filing of the indictment, bore a good general reputation in the community in which he lived, for truth, honesty and fair dealing, such good general reputation is of itself sufficient to create a reasonable doubt as to his guilt. And if you entertain a reasonable doubt as to the guilt or innocence of the defendant Sam Ormont because of his good general reputation, or because of any other reason or fact, it is your duty to find him not guilty.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that it is neither criminal nor unlawful for a person to do, or to agree to do, that which the law does not prohibit but recognizes may be lawfully done. So if you believe from the evidence in this case, or if you entertain a reasonable

doubt, that whatever act or acts was or were done by the defendant was or were done, not with any criminal intent or not for the purpose of doing or performing any unlawful act, but, on the other hand, was or were done honestly and with an honest intent and purpose and in the belief that such act or acts was or were proper and lawful, then I instruct you that no crime has been committed, and it will be your duty to find the defendant Sam Ormont not guilty.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that the argument of the United States Attorney is not evidence, and is not entitled to any additional weight or respect by reason of the fact that such argument is made by such governmental official.

Requested Jury Instruction No.....
of Defendant Sam Ormont

In order to convict the defendant Sam Ormont upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the indictment, but that the defendant Sam Ormont was the one who committed such crime and that the circumstances are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable

the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant Sam Ormont not guilty.

Requested Jury Instruction No.....
of Defendant Sam Ormont

If, after a consideration of the whole case, any juror shall entertain a reasonable doubt of the guilt of the defendant Sam Ormont, it is the duty of such juror so entertaining such reasonable doubt to vote for a verdict of "not guilty."

The defendant Sam Ormont is presumed to be innocent until proven guilty; that presumption accompanies him throughout the trial; it goes with you to your retirement to consider your verdict and operates until you have arrived at a verdict. This presumption will avail to acquit the defendant Sam Ormont unless it be overcome by sufficient proof of his guilt to convince you, and each of you, to a moral certainty and beyond all reasonable doubt of his guilt. You must examine the evidence in the light of presumption of innocence, and unless you find the evidence sufficiently strong to overcome this presumption, and, further, to satisfy you beyond all reasonable doubt of the guilt of the defendant Sam Ormont, he is entitled to a verdict of acquittal at your hands.

Requested Jury Instruction No.....

of Defendant Sam Ormont

You are instructed that if you find from the evidence that defendant Sam Ormont paid all of the income tax due and owing by him for the calendar year 1944, or paid an amount in excess of the income and victory tax due and owing by him for the calendar year 1944, you must find the defendant Sam Ormont not guilty of Count 1 of the indictment.

Section 145(b) Internal Revenue Code, 26

U. S. C. 145(b);

Gleckman vs. U. S., 80 F. (2d) 394, 297 U. S. 709;

U. S. vs. Schenck, 126 F. (2d) 702, 316 U. S. 705;

Rose vs. U. S., 128 F. (2d) 622, 317 U. S. 651.

Requested Jury Instruction No.....

of Defendant Sam Ormont

You are instructed that the defendant Sam Ormont is not charged with concealing or attempting to conceal the gross or net income received by him, or the sources thereof, but with willfully attempting to defeat and evade income tax. Therefore, if you find from the evidence that defendant Sam Ormont did not attempt to evade the income tax due or owing by him, you must find him not guilty, irrespective of whether he did or did not conceal or attempt to conceal the true and correct gross or net income received by him.

Section 145(b) Internal Revenue Code, 26

U. S. C. 145(b);

Spies vs. U. S., 317 U. S. 492.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that one of the essential elements of the proof of evasion of income tax is a wilful intent; that is, actual knowledge of the existence of the obligation and a specific wrongful intent to evade payment thereof. If you find from the evidence that the defendant Sam Ormont did not have actual knowledge of the existence of an obligation to pay any income tax in addition to the income tax paid by him, if such obligation actually existed, or that the defendant Sam Ormont did not have a specific wrongful intent to evade such obligation, you must find him not guilty.

Hargrove vs. U. S., 67 F. (2d) 820;

Malone vs. U. S., 94 F. (2d) 281, 304 U. S.
562;

Spies vs. U. S., 317 U. S. 492.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that fraud is actual intentional wrongdoing, and the intent required is a specific purpose to evade a tax believed to be owing. Before you can convict the defendant, you must find from the evidence beyond a reasonable doubt that the return prepared by the defendant must not only be false and fraudulent, but that by such false and fraudulent return the defendant committed an actual intentional wrongdoing and that the

intent was a specific purpose to evade a tax believed to be owing. Mere negligence does not establish either.

Griffith vs. Commissioner, 7th Circ., 50 F. (2d) 782;

Mitchell vs. Commissioner of Internal Revenue, 188 F. (2d) 308.

Requested Jury Instruction No.....
of Defendant Sam Ormont

Livestock is an agricultural commodity and is a product of the soil.

3 C. J. S.—Page 366;

50 U. S. C.—A, Page.....

Requested Jury Instruction No.....
of Defendant Sam Ormont

A person whose gross income arises solely from the business of growing and selling products of the soil is exempt from the requirement of keeping permanent books of account or records.

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Page 3105.

Requested Jury Instruction No.....
of Defendant Sam Ormont

You are instructed that the indictment is a mere charge or accusation against the defendant, and is not any evidence of his guilt, and no juror in this case should permit himself or herself to be, to any

extent, influenced against the defendant because of, or on account of, the indictment. An indictment is merely a means of bringing a defendant to trial.

U. S. vs. Schanerman, 150 F. (2d) 941, 945, 946;

Little vs. U. S., 10th Circ., 73 F. (2d) 861, 864, 96 A. L. R. 889.

Requested Jury Instruction No.....
of Defendant Sam Ormont

If the taxpayer acts honestly under the advice of counsel or if the incorrect return is prepared by a Certified Public Accountant or a public accountant, who has knowledge of all the facts, the defendant is not guilty of any criminal intent.

D. W. Kuhn vs. U. S., 42 F. (2d) 210.

Requested Jury Instruction No.....
of Defendant Sam Ormont

The use of the word "attempt" in the Code indicates that Congress intended some wilful commission in addition to the wilful omission that make up the list of misdemeanors, before a taxpayer can be found guilty of a felony.

Spies vs. U. S., 317 U. S. 492.

Requested Jury Instruction No.....
of Defendant Sam Ormont

In weighing the testimony of Internal Revenue officers, greater care should be used than in weigh-

ing the testimony of ordinary witnesses because of the natural and unavoidable tendency of such officers to procure and remember with partiality such evidence as would be against defendant.

Reid's Branson Instruction to Juries p 61
Sec. 3319.

Requested Jury Instruction No.....
of Defendant Sam Ormont

If you find from the evidence in this case that defendant Sam Ormont, prior to the filing of the indictment, bore a good general reputation in the community in which he lived or transacted business, for truth, honesty and fair dealing, such good general reputation is of itself sufficient to create a reasonable doubt as to his guilt. And if you entertain a reasonable doubt as to the guilt or innocence of the defendant Sam Ormont because of his good general reputation, or because of any other reason or fact, it is your duty to find him not guilty.

Requested Jury Instruction No.....
of Defendant Sam Ormont

In order to convict the defendants or either of them upon any count of the indictment in this case, the burden is upon the Government to prove beyond all reasonable doubt that said defendant or defendants did wilfully and knowingly attempt to defeat and evade a substantial part of the income tax due and owing to the Government, and that

such defendant or defendants did defraud the Government of a substantial portion of the income tax due said Government from said defendant or defendants.

U. S. vs. Schenck, 126 Fed. (2d) 702;
Gleckman vs. U. S., 80 Fed. (2d) 394;
Tinkoff vs. U. S., 86 Fed. (2d) 868;
Hargrove vs. U. S., 67 Fed. (2d) 820;
Rose vs. U. S., 128 Fed. (2d) 622, 626.

Requested Jury Instruction No. X-4
Of Defendant Sam Ormont

In order to establish the guilt of either of the defendants, the government must prove beyond all reasonable doubt not only an attempt to wilfully defraud it, but also that such defendant did actually defraud the government of a substantial portion of the tax due from such defendant, and that such tax was not paid by such defendant.

U. S. v. Schenck, 126 Fed. (2d) 702;
Gleckman vs. U. S., 80 Fed. (2d) 394;
Tinkoff v. U. S., 86 Fed. (2d) 868;
Hargrove v. U. S., 67 Fed (2d) 820;
Rose v. U. S., 1728 Fed (2d) 622 to 626.

Requested Jury Instruction No.
Of Defendant Sam Ormont

The reporting and payment of tax by a taxpayer in other years, under a belief that that is when it is due, even though the taxpayer was wrong in such belief, nevertheless is a defense to a charge of the

kind embraced within the indictment in this case, for the reason that it shows that there was no "wilful" violation of the law. A violation of the Internal Revenue Code as charged in the case at bar must be a "wilful" violation in order to constitute a crime.

Hargrove v. U. S., 67 Fed (2d) 820;

Murray v. U. S., 117 Fed. (2) 40.

Requested Jury Instruction No.

Of Defendant Sam Ormont

An underestimate of one's income does not constitute a violation of the Internal Revenue Code, unless such underestimate was wilful and intentional.

U. S. v. Koppelman, 61 Fed. Supp. 1007.

Requested Jury Instruction No. X-9.

Of Defendant Sam Ormont

Failure of a taxpayer to report income which he honestly believed was not taxable does not constitute a wilful violation of the Internal Revenue Code.

• U. S. v. LaFontaine, 54 Fed. (2d) 371;

Murray v. U. S., 117 Fed. (2) 40.

Requested Jury Instruction No. X-8

Of Defendant Sam Ormont

Failing to account and pay income tax in the proper year, and paying and accounting for the same in a different year by the taxpayer, and under his honest belief that that is when it is due does not constitute a violation of the Internal Revenue Code.

Hargrove v. U. S., 67 Fed. (2d) 820;

Spies v. U. S., 317 U. S. 492.

Requested Jury Instruction No.
Of Defendant Sam Ormont

In order for you to find the defendants or either of them guilty as charged in the various separate counts of the indictment in this case, the government must prove beyond all reasonable doubt the charges contained in said indictment and that the defendant or defendants against whom such charges are made wilfully and knowingly committed the acts therein complained of.

145(b) Internal Revenue Code;
Gleckman v. U. S., 80 Fed. (2d) 394;
Tinkoff v. U. S., 86 Fed. (2d) 868;
U. S. v. Schenck, 126 Fed (2d) 702;
Hargrove v. U. S., 67 Fed. (2d) 820;
Rose v. U. S., 128 Fed. (2d) 622 to 626;
Murray v. U. S., 117 Fed (2d) 40;
U. S. v. Skidmore, 123 Fed. (2d) 604;
Spies v. U. S., 317 U. S. 492.

Requested Jury Instruction No. X-6
Of Defendant Sam Ormont

To establish its case, the government must prove beyond a reasonable doubt that the defendants not only attempted to wilfully defraud the government, but that at the time the indictment in this case was returned, to-wit, on January 22, 1947, a tax in addition to the tax already paid by such defendant remained due and unpaid, and that the defendant knew that he owed such additional tax. You are instructed that in order to convict either of the defendants in this case under the charges embraced in the indict-

ment herein, the government must prove beyond all reasonable doubt that the alleged violations of said act were not only done by the defendant or defendants, but were done wilfully and knowingly, and not under an honest belief by the defendant that he had accounted and paid all tax legally due.

Requested Jury Instruction No. X-7

Of Defendant Sam Ormont

You are instructed that under the Internal Revenue Law, a partnership or joint venture may elect to use what is known as a fiscal year instead of a calendar year for the purpose of reporting and paying income tax on income derived from such partnership or joint venture. Such fiscal year may be any period not exceeding twelve months and is not required to conform to the calendar year. Where such fiscal year is so used, the taxpayer is not required to pay the tax owing thereon until on or before the 15th day of March of the year following the termination of such fiscal year. For instance, if you should find from the evidence in this case that the defendants were co-partners or joint venturers and derived an income therefrom, and if you further find that as such co-partners or joint venturers they elected to use a fiscal year commencing with the first day of May, 1944, and ending with the last day of April, 1945, then and in that event said defendants were not required under the law to account for or pay any income tax on such income until on or before the 15th day of March, 1946; and therefore, and as to any such income, the defendants would not be guilty of any crime charged in the indictment in this case.

Requested Jury Instruction No. . . .

Of Defendant Sam Ormont

You are instructed that if you find from the evidence in this case that prior to the return of the indictment herein on January 22, 1947, the defendants believed that any income received by them from a partnership or joint venture commencing with the first day of May, 1944, was not payable until March, 1946, and if you further find that the additional income tax which the government claims was defeated and evaded for the year 1944 was the income from such copartnership or joint venture, then and in those events it is your duty to acquit the defendants, even though you may believe that said defendants were mistaken as to when and in what year such tax was payable.

Requested Jury Instruction No. . . .

Of Defendant Sam Ormont

You are instructed that the defendants in this case are presumed to be innocent, and it is your duty to weigh and consider the evidence in the light of said presumption. You are instructed that the burden is upon the government in this case to prove beyond all reasonable doubt not only that the defendants or defendant made and filed a false and fraudulent return at the times set forth in the indictment, but must further prove that such defendant or defendants at the time of so filing such return did so wilfully and knowingly and with intent to defeat and evade a substantial portion of his or their income tax due the government for such year.

Requested Jury Instruction No.

Of Defendant Sam Ormont

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Requested Jury Instruction No.

Of Defendant Sam Ormont

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider, for any purpose, any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter should be treated as though you had never known it.

Requested Jury Instruction No.

Of Defendant Sam Ormont

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to be speaking the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that shows, or pertains to, the character of the witness for truth, honesty or integrity, or that pertains to his motives.

Requested Jury Instruction No.

Of Defendant Sam Ormont

The rules of evidence ordinarily do not permit the opinion of a witness to be represented as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion, and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

Requested Jury Instruction No.

Of Defendant Sam Ormont

You are instructed that the failure of a defendant to testify should not create any prejudicial or un-

favorable inference in your minds, as the defendant is not required to prove his innocence, and no inference can be drawn against such defendant for his failure to testify.

People v. Russo, 85 Cal. App. 672;
8 Cal. Jur. 358 Sec. 395.

Requested Jury Instruction No. X-8
Of Defendant Sam Ormont

It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the delinquency of tax and its collection with interest for the delay. If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, (five per cent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the addition is fifty per cent thereof.

Spies v. U. S., 317 U. S. 492 to 496-7.

Requested Jury Instruction No.
Of Defendant Sam Ormont

You are instructed that any evidence that was admitted as to only one defendant may not be used by you in considering the evidence against a co-defendant.

[Endorsed]: Filed May 23, 1947.

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY
DEFENDANT PHILLIP HIMMELFARB

Comes now the defendant Phillip Himmelfarb and requests the Court to give to the jury for its consideration the following instructions and each of them:

7/13/47

Refused or covered.

/s/ PEIRSON M. HALL,
Judge.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 17

You are instructed that it is neither criminal nor unlawful for a person to do, or to agree to do, that which the law does not prohibit but recognizes may be lawfully done. So if you believe from the evidence in this case, or if you entertain a reasonable doubt, that whatever act or acts was or were done by the defendants was or were done, not with any criminal intent or not for the purpose of doing or performing any unlawful act, but, on the other hand, was or were done honestly and with an honest intent and purpose and in the belief that such act or acts was or were proper and lawful, then I instruct you that no crime has been committed, and it will be your duty to find the defendant Phillip Himmelfarb not guilty.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 22

You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or caused to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, and you are unable to determine from the evidence whether such return was or was not false or fraudulent, or if you have a reasonable doubt as to whether such return was or was not false or fraudulent, you must find the defendant Phillip Himmelfarb not guilty.

Section 145 (b), Internal Revenue Code, 26
U. S. C. 145 (b);
Malone v. U. S., 304 U. S. 562, 94 F. (2d) 281;
Hargrove v. U. S., 67 F. (2d) 820;
Spies v. U. S., 31 U. S. 492.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 23

You are instructed that if you find from the evidence that the defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, but that such return was not false and fraudulent, you must find the defendant Phillip Himmelfarb not guilty.

Section 145 (b), Internal Revenue Code, 26
U. S. C. 145 (b);
Malone v. U. S., 304 U. S. 562, 94 F. (2d) 281;
Hargrove v. U. S., 67 F. (2d) 820;
Spies v. U. S., 317 U. S. 492.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 27

You are instructed that in a prosecution for wilfully attempting to evade income taxes the Government must prove not only that the defendants attempted wilfully to defraud it, but must establish that a tax in addition to what the defendants had already paid remains owing. Therefore, if you find from the evidence that the defendant Phillip Himmelfarb paid all of the income tax due and owing by him for such calendar year 1944, or paid an amount in excess of the income tax due and owing by him for such calendar year 1944, you must find him not guilty of Count II of the indictment, irrespective of whether he did or did not wilfully attempt to invade income taxes for such year.

U. S. v. Schenck, 126 F. (2d) 702;
Gleckman v. U. S., 80 F. (2d) 394, 297 U. S.
709;
Rose v. U. S., 128 F. (2d) 622, 317 U. S. 651.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 1

It is your duty to try this case fairly and impartially between the government and the defendants, upon the evidence before you, and upon that alone. You must not permit any prejudice to enter into your deliberation as to the guilt or innocence of the defendants. The nature of the charge should not be permitted by you to influence your judgment one way or the other as to whether or not the defend-

ants are guilty as charged. Our law presumes every person charged with crime innocent until proven guilty, and no person can be found guilty of any offense unless his guilt is first established to a moral certainty and an abiding conviction and beyond all reasonable doubt.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 2

The mere fact that an indictment has been filed charging the defendants with a crime does not itself raise any presumption or inference as to the guilt of the defendants. The mere fact that they have been brought into court by the ordinary criminal process and are here on trial, should not be considered by you as any evidence whatsoever of their guilt.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 3

You are instructed that the defendants in this case are entitled to the individual opinion of each member of this jury and that no member of this jury should vote for a conviction of either of the defendants because of the opinion of the other members of the jury so long as he has a reasonable doubt as to the guilt of such defendant.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 4

The Court instructs you that all the presumptions of law independent of evidence, are in favor of innocence, and every person accused of crime is pre-

sumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt. This presumption attaches at every stage of the case and to every fact essential to a conviction.

By the term "reasonable doubt" is not mean every possible doubt or conjecture that may suggest itself to your minds. A reasonable doubt is not a mere guess or surmise, because everything relating to human affairs and dependent on moral evidence is subject to some possible or imaginary doubt. A reasonable doubt is that stage of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

You are instructed that the defendants at the outset of the trial are presumed to be innocent. They are not required to prove themselves innocent or to put in any evidence at all upon that subject. In considering the testimony in the case, you must look at that testimony and view it in the light of the presumption with which the law clothes them—that they are innocent, such presumption is to be considered through this trial, unless the evidence convinces you to the contrary beyond all reasonable doubt.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 5

You are instructed that the presumption of innocence is not a mere matter of form, to be disregarded by you at your pleasure, but is an essential, substan-

tial part of the law of the land, and binding upon you in this case, and it is your duty to give the defendants the full benefit of this presumption and to acquit him, unless the evidence in the case convinces you beyond all reasonable doubt of the guilt of such defendant.

Defendant Phillip Himmelfarb's

Proposed Instruction No. 6

The jury is instructed that each essential independent fact necessary to complete a chain or series of independent facts tending to establish a presumption of guilt, should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact, must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances must all concur to show that the defendant committed the crime charged and must all be inconsistent with any other rational conclusion and must exclude to a moral certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt.

Defendant Phillip Himmelfarb's

Proposed Instruction No. 7.

It is a recognized principle of our system of law that in order to convict a defendant, the facts proven must not only be consistent with the theory of guilt, but inconsistent with any reasonable theory of innocence, and this I charge is the law.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 8

It is not your duty to look for some theory upon which to convict the defendants, but, on the contrary, it is your duty and the law requires you to, if you can reasonably do so, reconcile any and all circumstances that have been shown with the innocence of the defendants, and so acquit them.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 9

You are instructed that where two or more equally reasonable inferences may be drawn from a fact shown, that inference leading to a conclusion of innocence should be accepted, rather than one leading to a conclusion of guilt.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 10

You are instructed that if one set or chain of circumstances leads to two opposing conclusions, one pointing to the guilt, the other to the innocence of the defendants, and the jury has any reasonable doubt as to which of such conclusions the chain of circumstances leads, a reasonable doubt is thereby created, and the defendants should be acquitted.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 11

It is the duty of the jury to enter upon the consideration of each circumstance proven, having in

their minds the presumption that defendants are innocent, and in considering each fact or circumstance they should apply it to a presumption of innocence, and if such fact or circumstance, when considered with all the evidence in the case, can be explained consistently with innocence, it is their duty to so explain it.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 12

A witness may be impeached by the party against whom he was called by contradictory evidence, or by evidence that he has made at other times, statements inconsistent with those to which he testified. If you believe that any witness has been successfully so impeached you are at liberty to consider such impeachment in determining the credibility of such witness.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 13

If you believe from the evidence in this case that any witness in the case was influenced or induced to become such a witness and to testify in this case by any hope held out that he would not be prosecuted for any reason for offenses committed, then the jury should take such facts into consideration in determining the weight and credit which should be given to the testimony of a witness thus obtained.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 14

You cannot base a verdict of guilt upon extra judicial oral admissions, or statements of a defendant

alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti, and if you do not believe after a consideration of all the evidence that the body of the crime or corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 16

If you find from the evidence in this case that defendant Phillip Himmelfarb, prior to the filing of the indictment, bore a good general reputation in the community in which he lived, for truth, honesty and fair dealing, such good general reputation is of itself sufficient to create a reasonable doubt as to his guilt. And if you entertain a reasonable doubt as to the guilt or innocence of the defendant Phillip Himmelfarb because of his good general reputation, or because of any other reason or fact, it is your duty to find him not guilty.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 18

You are instructed that the law presumes the acts of all men have been rightfully, properly and honestly performed, and that the acts shown by the evidence to have been performed by the defend-

ants were performed properly and honestly and by reason of honest and proper motives, unless the contrary is established to your satisfaction beyond a reasonable doubt.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 19

You are instructed that the argument of the United States Attorney is not evidence, and is not entitled to any additional weight or respect by reason of the fact that such argument is made by such governmental official.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 20

In order to convict the defendant Phillip Himmelfarb upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the indictment, but that the defendant Phillip Himmelfarb was the one who committed such crime and that the circumstances are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant Phillip Himmelfarb not guilty.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 21

If, after a consideration of the whole case, any juror shall entertain a reasonable doubt of the guilt of the defendant Phillip Himmelfarb, it is the duty of such juror so entertaining such reasonable doubt to vote for a verdict of "not guilty".

The defendant Phillip Himmelfarb is presumed to be innocent until proven guilty; that presumption accompanies him throughout the trial; it goes with you to your retirement to consider your verdict and operates until you have arrived at a verdict. This presumption will avail to acquit the defendant Phillip Himmelfarb unless it be overcome by sufficient proof of his guilt to convince you, and each of you, to a moral certainty and beyond all reasonable doubt of his guilt. You must examine the evidence in the light of presumption of innocence, and unless you find the evidence sufficiently strong to overcome this presumption, and, further, to satisfy you beyond all reasonable doubt of the guilt of the defendant Philip Himmelfarb, he is entitled to a verdict of acquittal at your hands.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 24

You are instructed that if you find from the evidence that the defendant Philip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the

income tax return referred to in Count II of the indictment, but find that in the preparation and filing thereof, defendant Philip Himmelfarb did so in an honest belief that such return was true and correct, you must find the defendant Phillip Himmelfarb not guilty.

Section 145 (b), Internal Revenue Code, 26

U.S.C. 145 (b);

U.S. v. Schenk, 126 F. (2d) 702, 316 U.S. 705;

Nicola v. U.S., 72 F. (2d) 780;

U.S. v. LaFontaine, 54 F. (2d) 371.

Defendant Phillip Himmelfarb's

Proposed Instruction No. 25

You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, and that in the preparation and filing thereof defendant Phillip Himmelfarb was acting under a mistake of fact respecting, or was in ignorance of, the truth or falsity of the matter set forth in such return, you must find the defendant Phillip Himmelfarb not guilty.

Section 145 (b), Internal Revenue Code, 26

U.S.C. 145 (b);

Hargrove v. U.S., 67 F. (2d) 820;

U.S. v. Schenck, 126 F. (2d) 702, 316 U.S. 705.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 28

You are instructed that if you find from the evidence that defendant Phillip Himmelfarb paid all of the income tax due and owing by him for the calendar year 1944, or paid an amount in excess of the income tax due and owing by him for the calendar year 1944, you must find the defendant Phillip Himmelfarb not guilty of Count II of the indictment.

Section 145 (b), Internal Revenue Code, 26
U.S.C. 145 (b);

Gleckman v. U. S., 80 F. (d) 394, 297 U.S.
709;

U. S. v. Schenck, 126 F. (2d) 702, 316 U.S.
705;

Rose v. U.S., 128 F. (2d) 622, 317 U.S. 651.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 29

You are instructed that if you find from the evidence that the defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed the income tax return referred to in Count II of the indictment, and that such return did not set forth the true and correct net income and the amount of tax due and owing thereon, as a result of mere negligence or carelessness of defendant Phillip Himmelfarb in making such return, you must find the defendant Phillip Himmelfarb not guilty.

U.S. v. Schenck, 126 F. (2d) 702.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 30

You are instructed that if you find from the evidence that defendant Phillip Himmelfarb did prepare and file, or cause to be prepared and filed with the Collector of Internal Revenue the income tax return referred to in Count II of the indictment, but are unable to determine from the evidence whether or not defendant Phillip Himmelfarb did so in the honest belief that such return was true and correct, or if said defendant was acting under a mistake of fact respecting, or in ignorance of, the truth or falsity thereof, you must find the defendant Phillip Himmelfarb not guilty.

Section 145 (b), Internal Revenue Code, 26

U.S.C. 145 (b);

Hargrove v. U.S., 67 F. (2d) 820;

U.S. v. Schenck, 126 F. (2d) 702.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 33

You are instructed that if you find from the evidence that the defendants were joint venturers or co-partners and for any reason whatsoever could not lawfully elect to report the income from such joint venture or partnership upon a fiscal year basis, and that the defendants elected and reported the income from such joint venture on a fiscal year basis as the result of ignorance or a mistake or misunderstanding of the law respecting the use of a fiscal year basis, you must find the defendants not guilty.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 34

If you find from the evidence that the defendants were joint venturers or co-partners and derived an income from such joint venture or co-partnership, and that as such co-partners or joint venturers they elected to use a fiscal year commencing on the 1st day of May, 1944, and ending on the last day of April, 1945, you are instructed that then and in that event said defendants were not required, under the law, to account for or pay any income tax on such income until on or before the 15th day of March, 1946, and therefore as to any such income the defendant Phillip Himmelfarb would not be guilty of the crime charged against him in the indictment in this case, and you must acquit him.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 35

You are instructed that if you find from the evidence that the defendant Phillip Himmelfarb believed that any income received by him from a partnership or joint venture was accountable and the tax thereon was payable by him as income for the year 1945, then and in that event it is your duty to find the defendant Phillip Himmelfarb not guilty even though you may believe that he was mistaken as to when or in what year such income was accountable and payable.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 36 (44)

A taxpayer who reports and pays income tax in a given year or years under a belief that such year or years is the year or years when such tax is due, has not committed an offense under the Internal Revenue Law even though the taxpayer was wrong in such belief, for the reason that under such circumstances there was no "willful" violation of the law, and a violation of the provisions of the Internal Revenue Code charged in this case must be willful in order to constitute a crime.

Therefore, if you find from the evidence that the defendant Phillip Himmelfarb reported and paid a tax owed by him in a year other than the year in which such tax was due under a belief that the tax so reported and paid by him was due in the year for which he reported and paid same, you must find the defendant Phillip Himmelfarb not guilty.

Hargrove v. U.S., 67 F. (2d) 820;

Murray v. U.S., 117 F. (2d) 40.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 38

You are instructed that the defendants are not charged with concealing or attempting to conceal the gross or net incomes received by them, or the sources thereof, but with willfully attempting to defeat and evade income tax. Therefore, if you find from the evidence that defendant Phillip Him-

melfarb did not attempt to evade the income tax due or owing by him, you must find him not guilty, irrespective of whether he did or did not conceal or attempt to conceal the true and correct gross or net incomes received by him.

Section 145 (b), Internal Revenue Code,
26 U.S.C., 145 (b);

Spies v. U.S., 317 U.S. 492.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 39

You are instructed that one of the essential elements of the proof of evasion of income tax is a willful intent; that is, actual knowledge of the existence of the obligation and a specific wrongful intent to evade payment thereof. If you find from the evidence that the defendant Phillip Himmelfarb did not have actual knowledge of the existence of an obligation to pay any income tax in addition to the income tax paid by him, if such obligation actually existed, or that the defendant Phillip Himmelfarb did not have a specific wrongful intent to evade such obligation, you must find him not guilty.

Hargrove v. U.S., 67 F. (2d) 820;

Malone v. U.S., 94 F. (2d) 281, 304 U.S. 562;

Spies v. U.S., 317 U.S. 492.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 40

You are instructed that there is nothing morally or legally wrong in desiring to avoid but not evade taxes and to take proper and legal steps to do this, and a taxpayer is acting within his legal rights

and is not guilty of violating the law by operating through different corporations or partnerships rather than individually and personally, or by shifting a real transaction from an individual and personal transaction to a corporation or partnership in order to lower his tax rate. If you find from the evidence in this case that the defendant Phillip Himmelfarb apportioned business transactions between himself and any partnership or joint venture of which he was a member, which apportionment was due to a desire to keep down his taxes, such apportionment was lawful and he should be acquitted.

Nicola v. U.S., 72 F. (2d) 780.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 41

You are instructed that in order to convict the defendants for willfully attempting to evade income taxes, the prosecution must prove beyond a reasonable doubt that income tax was due from the defendants for the years alleged in the indictment over and above the amounts shown in the returns filed for such years, and that the defendants with evil motive, consciously, deliberately and intentionally attempted to evade such taxes. If you find from the evidence that no income tax was due from defendant Phillip Himmelfarb for the year 1944 over and above the amount shown in his return, or if there is a reasonable doubt in your mind with respect thereto, or if you find that there was due from defendant Phillip Himmelfarb for the year 1944 income tax over and above the amount shown

in the return but that the defendant did not with evil motive, consciously, deliberately and intentionally attempt to evade such taxes, or if there is a reasonable doubt in your mind with respect thereto, you must find the defendant Phillip Himmelfarb not guilty.

Gleckman v. U.S., 80 F. (2d) 394, 297 U.S. 709;

Hargrove v. U.S., 67 F (2d) 820.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 42 (45)

The failure to account and pay income tax in the year for which such tax should be accounted and paid, and the paying and accounting for such tax in a different year by the taxpayer under an honest belief by him that such year is when the tax is due, does not constitute a violation of the Internal Revenue Code.

Hargrove v. U.S., 67 F. (2d) 820;

Spies v. U.S., 317 U.S. 492.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 47

During the trial of this case certain evidence was received against defendant Sam Ormont only. Such evidence may be considered by you only when considering the case of defendant Sam Ormont and must not be considered in connection with the case of defendant Phillip Himmelfarb for any purpose whatsoever.

California Jury Instructions—Criminal, No. 39 Adapted.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 48

You are directed to find the defendant Phillip Himmelfarb not guilty.

Defendant Phillip Himmelfarb's
Proposed Instruction No. 49

You are directed to acquit the defendant Phillip Himmelfarb.

[Endorsed]: Filed June 3, 1947.

At a stated term, to wit: The February Term, A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 13th day of June in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER JUNE 13, 1947

This cause coming on for further jury trial of defendants Sam Ormont and Phillip Himmelfarb; Wm. Strong, Assistant U. S. Attorney, appearing as counsel for the Government; Daly B. Robnett and Benj. F. Kosdon, Esqs., appearing as

counsel for Defendant Ormont; Wm. Katz, Esq., appearing for Defendant Himmelfarb; both of the said defendants being present on bond:

Attorney Robnett argues in behalf of Defendant Ormont. Attorney Strong makes closing argument in behalf of the Government.

At 11:59 a.m. the Court instructs the jury. At 12:49 p.m. Bailiffs Brand and Strong are sworn to take charge of the jury and the jury thereupon retires to the jury room in the custody of the said bailiffs to deliberate upon a verdict.

The Court orders that the jury be taken to lunch and thereafter return to the jury room to consider its verdict.

At 12:50 p.m. court recesses until the return of the jury with a verdict.

At 3:25 p.m. the jury returns into court and the foreman of the jury presents verdicts which are read in open court, and it is ordered that the verdicts be filed and spread upon the minutes, the said verdicts as filed being as follows: [177]

* * * * *

The jury is discharged and excused until further notice. Attorney Katz moves for a continuance of the matter of sentence for the purpose of presentation of motions for new trial, etc., on behalf of Defendant Himmelfarb and Attorney Robnett joins in the motion on behalf of Defendant Ormont.

The Court continues hearing of oral motions of Attorneys Katz and Robnett until 10 a.m., June 16, 1947, and also of the matter of sentence and all further proceedings until that time.

On motions of Attorneys Katz and Robnett, it is ordered that Defendants Ormont and Himmelfarb be released on their own recognizance and that the said defendants return into court June 16, 1947, at 10 a.m. [178]

In the District Court of the United States, Southern
District of California, Central Division.

No. 19138—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
Defendants.

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Sam Ormont, guilty as charged in Count One of the indictment; and

We, the Jury in the above-entitled cause, find the defendant, Phillip Himmelfarb, guilty as charged in Count Two of the indictment.

/s/ GUY F. CAMPBELL,

Foreman of the Jury.

Dated: Los Angeles, California, June 13, 1947.

[Endorsed]: Filed June 13, 1947. [179]

[Title of District Court and Cause.]

MOTION FOR ACQUITTAL AND
MOTION FOR NEW TRIAL

The defendant Phillip Himmelfarb moves the Court for judgment of acquittal on Count II of the indictment notwithstanding the verdict of the jury, and in the alternative, moves the Court to grant him a new trial as to Count II of the indictment, for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence on the part of the prosecution;

2. The Court erred in denying defendant's motion for acquittal made at the conclusion of all the evidence;

3. The verdict is contrary to the weight of the evidence;

4. The verdict is not supported by substantial evidence;

5. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: The attorney for the Government repeatedly referred to other alleged crimes and offenses respecting which there was no evidence before [180] this Court against this moving defendant, all of which said matters as well as other matters referred to by the attorney for the Government were de hors the record; and the attorney for the Government stated in his argument that a witness not called was as accessible to defendant

as to the Government, and repeatedly demanded why such witness, as well as another witness who was called by the Government but did not testify as to some matters, were not called by defendant to testify for and on behalf of defendant, the attorney for the Government then knowing full well that defendant was not required to prove his innocence, but that it was the burden of the Government to prove his guilt beyond a reasonable doubt;

6. The Court erred in charging the jury and in refusing to charge the jury as requested.

Dated, at Los Angeles, California, this 16th day of June, 1947.

/s/ WILLIAM KATZ,

Attorney for Defendant,

Phillip Himmelfarb.

[Endorsed]: Filed, June 16, 1947. [181]

At a stated term, to wit: The February Term, A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 16th day of June in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER JUNE 16, 1947

This cause coming on for hearing on motion of the defendants for acquittal or for a new trial, pursuant to oral notice thereof given in open court on June 13, 1947, and for sentence; Wm. Strong, Assistant U. S. Attorney, appearing as counsel for the Government; Daly B. Robnett and Benj. F. Kosdon, Esqs., appearing as counsel for Defendant Ormont; Wm. Katz, Esq., appearing as counsel for Defendant Himmelfarb; both of the said defendants being present on their own recognizance:

Attorney Katz argues in support of a motion for an acquittal and for a new trial, citing argument of counsel for the Government before the jury as prejudicial, and it is ordered that the said motions as to Defendant Himmelfarb are denied.

Attorney Robnett orally moves for a judgment non-abstante verdicto and for a new trial on the grounds that the Court failed to strike the testimony of Witness Eustice, particularly as to the years 1942 and 1943, having acquitted Defendant Ormont on counts 3 and 4 of the indictment, and it is ordered that the said motions are denied.

The Court pronounces sentence upon each of the said defendants as follows: [182]

* * * * *

District Court of the United States, Southern District of California, Central Division.

No. 19138

Criminal Indictment in four counts for violation
of U. S. C., Title 26

Sec. 145(b)—Internal Revenue Code

UNITED STATES

vs.

PHILLIP HIMMELFARB.

JUDGMENT AND COMMITMENT

On this 16th day of June, 1947, came the United States Attorney, and the defendant, Phillip Himmelfarb, appearing in proper person, and by counsel, William Katz, Esq., and,

The defendant having been convicted on a verdict of guilty of the offense charged, in the indictment in the above-entitled cause, to wit: willfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing to the United States of America for the calendar year 1944 by preparing and filing with the Collector of Internal Revenue a false and fraudulent income tax return as set forth in count two of the indictment and on which the defendant was found guilty, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) year and one (1) day on count two in an institution of the penitentiary type to be selected by the Attorney General.

It is further ordered that the defendant be granted a stay of execution of commitment until 12 noon, July 16, 1947, and released on bond during said stay, the bond being fixed in the sum of \$10,000.00, and that same be posted by 5 p. m., June 16, 1947;

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ PEIRSON M. HALL,

United States District Judge.

Filed this 16th day of June, 1947.

EDMUND L. SMITH,

Clerk.

(By) /s/ J. M. HORN,

Deputy Clerk.

[183]

District Court of the United States, Southern District of California, Central Division.

No. 19138

Criminal Indictment in four counts for violation of U. S. C., Title 26

Sec. 145(b)—Internal Revenue Code

UNITED STATES

vs.

SAM ORMONT

JUDGMENT AND COMMITMENT

On this 16th day of June, 1947, came the United States Attorney, and the defendant Sam Ormont appearing in proper person, and by counsel, Daly B. Robnett and Benjamin F. Kosdon, Esqs., and,

The defendant having been convicted on a verdict of guilty of the offense charged in the indictment in the above-entitled cause, to wit; willfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing to the United States of America for the calendar year 1944 by preparing and filing with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income and victory tax return, and by concealing and attempting to conceal from the said Collector the true and correct incomes received by the defendant herein as set forth in count one, and the defendant having been now asked whether he has anything to say why judgment should not

be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year (1) and one (1) day on count one in an institution of the penitentiary type to be selected by the Attorney General.

It is further ordered that the defendant be granted a stay of execution of commitment until 12, noon, July 16, 1947, and released on bond during said stay, the bond being hereby fixed in the sum of \$10,000.00, and that same be posted by 5 p. m., June 16, 1947.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ PEIRSON M. HALL,

United States District Judge.

Filed this 16th day of June, 1947.

EDMUND L. SMITH,

Clerk.

(By) /s/ J. M. HORN,

Deputy Clerk.

[184]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 19094

(18 U. S. C. 88;) (50 U. S. C. App. 901 et seq.)
Conspiracy; Emergency Price Control Act of 1942.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
d/b/a/ ACME MEAT COMPANY,

Defendants.

APPLICATION AND MOTION FOR IMMUNITY AND FOR ORDER BARRING FURTHER PROBATION OF DEFENDANT SAM ORMONT

To the Honorable District Court of the United States for the Southern District of California, Central Division, to the Honorable Peirson M. Hall, Judge thereof, to the plaintiff in the above-entitled action, to James M. Carter, United States Attorney, Howard B. Calverly, Chief, Criminal Division, Assistant United States Attorney, and William Strong, Assistant United States Attorney, Attorneys for plaintiff:

You and each of you will please take notice that on Monday, the 19th day of May, 1947, at the hour

of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, the defendant Sam Ormont in the above-entitled case, by and through his attorneys, Benjamin F. Kosdon and Daly B. Robnett, will move the said Honorable Court, the [185] Honorable Judge Peirson M. Hall presiding, for an Order of said Court granting the said defendant Sam Ormont immunity from prosecution under the indictment in the above-entitled case, and for an Order barring all further prosecution of said defendant thereunder.

As grounds for said motion, upon which the same will be made, said defendant alleges:

I.

That on or about the of February, 1946, the duly constituted Grand Jury of said court for the Southern District of California, Central Division, was engaged in the investigation of the matter of whether or not said defendant and others, particularly The Southern California Meat Company and others connected therewith, had been guilty of violations of the Emergency Price Control Act of 1942 and amendments thereto and of regulations thereunder; that at said time and place the plaintiff in this action caused a subpoena to be duly issued and directed to this defendant and served upon him, requiring his attendance before the said Grand Jury as a witness and to give testimony in connection with said investigation; and that, pursuant to said subpoena and not otherwise, said defendant did appear before said Grand Jury and was, without

his consent, duly sworn as a witness and interrogated on the said subject and matters so then under investigation, and was compelled to answer questions concerning the same. That before being so sworn and required to testify, this said defendant was not advised by anyone of his constitutional rights to refuse to answer in the event any of said answers might incriminate him, and was not advised that said evidence sought to be elicited from him would be used against him, and was not advised that he was under investigation, and this defendant did not know of his said constitutional rights, did not know that he had a right to so refuse to answer any such questions propounded to him that might in any way incriminate him, and had not sought or obtained advice from any attorney on any of said subjects, but on the contrary and by reason of said acts of [186] plaintiff in so issuing said subpoena and serving it upon him and thereby compelling him to attend at said hearing, said defendant believed that he had no right to refuse to testify or to answer any questions propounded to him by said inquisitorial body, and therefore this said defendant did answer questions pertinent to and in connection with the said inquiry before said Grand Jury.

II.

That thereafter the said Grand Jury, being, as this defendant is informed and believes, the same Grand Jury before whom said defendant had so been compelled to appear, voted and returned to

this honorable Court the indictment in this action Number 19094, charging this defendant with violations of the said Emergency Price Control Act of 1942 and of the Revised Maximum Price regulations in said indictment numbered and set forth. That by reason of said facts hereinbefore alleged, this defendant was compelled to be a witness against himself, contrary to the Constitution and Statutes of the United States; and this defendant is informed and believes and is advised by his counsel that in their opinion this defendant is entitled to immunity from any prosecution in this action or in any action growing out of the said investigation in which he was so compelled to testify.

III.

This defendant further alleges that on the 21st day of January, 1946, the Acting District Director of the Office of Price Administration of the United States of America, at Los Angeles, California, duly issued a subpoena directed to this defendant in the following words and figures:

“United States of America, Office of Price Administration. Subpoena Duces Tecum. Sam Armont d.b.a. Acme Meat Co., Workman Station, Southgate, California. At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Delbert F. Wells of the Office of Price Administration, at Room [187] 330 Western Pacific Bldg., 1031 South Broadway, Los Angeles, California, on the 22nd

day of January, 1946, at 9 o'clock a.m. of that day, to testify concerning Sam Ormont d.b.a. Acme Meat Co. and also Phil's Meat Co. And you are hereby required to bring with you and produce at said time and place the following documents: General Ledger, Journals, Invoices of Sales, U. S. Subsidy, Applications and all Subsidy Reports, Sales Registers, Cash Received Register, Bank Records and all other records of meat operations to include: Kill Records, Yield Records and Sales. All of the above for the years 1943, 1944 and 1945. Fail not at your peril. In witness whereof, the undersigned District Director of the Office of Price Administration, has hereunto set his hand at Los Angeles, Calif., this 21st day of January, 1946. (Signed) John O'Connor, Acting District Director." That, pursuant thereto, the said defendant was compelled to and did furnish to the said director and his duly constituted deputies or agents all of the said documents described and requested in the said subpoena, and was thereby compelled to furnish evidence against himself upon which the indictment in this case has been rendered. That prior to so furnishing said evidence, this defendant was not advised of his constitutional rights to refuse to give evidence that would incriminate him and was not advised that such evidence would be used against him in any criminal prosecution, and did not know of his constitutional rights or of his rights, if any, to immunity from such prosecution, and had he known of the same, said defendant would have refused to furnish any such information or data.

Said motion will be made and based upon this verified Notice and the facts stated herein, and upon all the papers, records, minutes and files in said action.

Wherefore, this defendant prays for an Order of this honorable Court granting him immunity from further prosecution in this case and as to each and every count of the indictment on file herein, and for a further Order barring the plaintiff in said action from further [188] proceeding with said case as against this defendant.

Dated this 15th day of May, 1947.

BENJAMIN F. KOSDON and

DALY B. ROBNETT,

By /s/ BENJAMIN F. KOSDON,

Attorneys for Defendants.

State of California,

County of Los Angeles—ss.

Sam Ormont, being first duly sworn, deposes and says: That he is the defendant named in the foregoing Application and Motion for Immunity and for Order Barring Further Prosecution of Defendant Sam Ormont; that he has read the same and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated upon his informaion or belief; and as to those matters he believes it to be true.

/s/ SAM ORMONT.

Subscribed and sworn to before me this 15th day of May, 1947.

/s/ BENJAMIN F. KOSDON,

Notary Public in and for the County of Los Angeles,
State of California. [190]

Points and Authorities

1. A witness who is subpoenaed before a Grand Jury or a Court and gives testimony pursuant thereto, does so under compulsion.

U. S. vs. Kallas, 272 Fed. 742, 752;

U. S. vs. Kimball, 117 Fed. 156, 163;

Counselman vs. Hitchcock, 142 U. S. 547;
35 L Ed 1110;

In re Simon, 297 Fed. 942;

People vs. Schwartz, 78 Cal. App. 561, 570;

People vs. O'Bryan, 165 Cal. 55, 62.

2. "Constitutional provision for the security of person and property should be liberally construed. A close literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the Courts to be watchful for the constitutional rights of a citizen and against all stealthy encroachments thereon. Their motto should be *obsta principiis*."

The foregoing quotation from *Boyd vs. U. S.*, 116 U. S. 616.

See also *People vs. Schwartz*, 78 Cal. App. 570, 571.

The following quotation is from the case of *U. S. vs. Kallas*, 272 Fed. 742, 752: "How can it be said that, if a Court required an accused to answer upon the witness chair, with the alternative of going to jail if he refused, it was such compulsion as to

invalidate the evidence so obtained, and, at the same time, that a prisoner questioned in jail by his captor was not compelled to give evidence against himself?

“Such a course would be to very nearly, if not quite, blind oneself as to what constitutes compulsion. As above pointed out, the compulsion forbidden by the amendment—or at least included in its prohibition—is compulsion exercised through the process of the Court. The commitment by which the petitioner in the present case [191] was held in jail is no less a compelling process than were he in Court and ordered upon the witness chair for examination . . . while it may be that many know of their rights, and, even when in prison, have the will and courage to stand upon them, there certainly are others who do not.”

3. A witness subpoenaed and compelled to testify is entitled to immunity from future prosecution, whether he claimed it or not at the time he gave the testimony, or whether or not he refused to answer on the ground of incrimination.

U. S. vs. Monia, 317 U. S. 424; 87 L Ed 376;

U. S. vs. Kallas, 272 Fed. 742, 752,

—above quoted from, and in which it is held that, while many persons may know their rights, many do not.

In the case at bar, the affidavit of the defendant shows that he did not.

4. Immunity from future prosecution exists in behalf of a witness so compelled to testify as to any crime or offense arising out of the acts to which the examination relates, whether or not the particular investigation being conducted at the time was for that specific offense.

Counselman vs. Hitchcock, 142 U. S. 547.

In re Tahbel, 46 Cal. App. 755 @ 759,

in which the Court said: "To bring a person within the immunity of this provision (provision of the constitution) it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him, or that a criminal proceeding should have been commenced and be actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law, and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be [192] compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured him against any use in a criminal prosecution of the evidence he may give; and this can only be done by a statutory provision that if he submits to the examination and answers the questions he shall be exempt from criminal prosecution for any offense that may be disclosed as a consequence of his examination (Ex parte Clarke, 103 Cal. 352; Counselman vs. Hitchcock, 142 U. S. 547; Karrel vs. Conlan, 155 Wis. 221)."

5. Immunity was granted the defendants in the case of U. S. vs. Armour and Co., 64 Fed. Supp. 855, which was a case under the O. P. A. regulations, and in which case the Court also held that even though the evidence given by the defendants was negative evidence, nevertheless they were immune from prosecution, since the questions might have brought forth an incriminating answer and the subject being investigated was one which would place them in real jeopardy of a prosecution.

In conclusion, we respectfully submit that the defendant Sam Ormont should be held immune from prosecution in this case by reason of the facts in his application set forth.

Respectfully submitted,

BENJAMIN F. KOSDON and
DALY B. ROBNETT,

By /s/ BENJAMIN F. KOSDON,
Attorneys for Defendants.

[Endorsed]: Filed May 16, 1947.

[193]

In the District Court of the United States in and
for the Southern District of California, Central
Division

INDICTMENT IN CASE NO. 18,366

Viol.: United States Code, Title 18, Section 88
United States Code, Title 50, App. Section 901 et
seq. Conspiracy to commit offenses against the
United States. Violations of the Emergency
Price Control Act of 1942.

In the District Court of the Southern District
of California—ss.

The Grand Jurors of the United States of
America, being duly impanelled, sworn and charged
in the District Court for the Southern District of
California, Central Division, in the September,
1945, Term of this Court, having begun but not
finished during the said September Term of Court,
among other things the matter of the investigations
charged in this indictment, and having continued to
sit by the order of this Court in and for the said
District during the February, 1945 Term to com-
plete inquiries begun, but not finished, at the
original term, and inquiring for that District, upon
their oaths find and present as follows:

Count 1

1. That at all times material herein, the Southern
California Meat Company, Inc., has been and now is
a corporation duly organized under the laws of the
State of California.

2. That Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou Segal, whose names are to the Grand Jurors otherwise unknown, and who are hereby indicted and named defendants herein, who at times material herein were engaged in the businesses of custom slaughterer, slaughterer, and wholesaler of meat, under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 165, 169 and 239 thereunder under the firm names of Southern California [194] Meat Co., Inc., Southern California Meat Company, No. 2, and Central Packing Company, since on or about July 1, 1943, and continuously thereafter to and including the finding and presenting of this indictment, in the County of Los Angeles, State of California, within the division and district aforesaid, and in other places to the Grand Jurors unknown, did feloniously and unlawfully conspire, combine and confederate together, and with diverse other persons whose names are to the Grand Jurors unknown, to commit offenses against the United States, to wit:

a. That the said defendants would charge **and cause** others to charge for slaughtering services at prices in excess of the maximum prices permitted under the Emergency Price Control Act of 1942, and applicable regulations promulgated thereunder, including revised Maximum Price Regulation No. 165;

b. That the said defendants would refuse **and cause** others to refuse to render slaughter-

ing services to any prospective purchasers of such services unless prices were paid therefor which were in excess of the maximum prices permitted under the aforesaid Emergency Price Control Act of 1942, and of the aforesaid Maximum Price Regulation No. 165;

c. That the said defendants would refuse and cause others to refuse to sell meat to any prospective purchasers unless the prices paid therefore were in excess of the maximum prices permitted under the aforesaid Emergency Price Control Act of 1942, and of the aforesaid Maximum Price Regulations Nos. 148, 169 and 239;

d. That the said defendants would sell and cause others to sell meat at prices in excess of the maximum prices permitted under the Emergency Price Control Act of 1942 and applicable regulations promulgated thereunder, including revised Maximum Price Regulations Nos. 148, 169 and 239;

e. That the said defendants would make and cause others to make false, fictitious and fraudulent entries upon the records kept by or for the said defendants in the conduct of their aforesaid business, [195] and/or businesses, in violation of the aforesaid Emergency Price Control Act of 1942 and the aforesaid Maximum Price Regulations Nos. 148, 165, 169 and 239;

f. That the said defendants would make fictitious payments, loans, transfers, collections and receipts of money to and from other per-

sons and firms for the purpose of concealing, and would otherwise conceal, the aforesaid illegal charges, false, fictitious and fraudulent entries, and receipts of prices for the aforesaid services and meat sold in excess of the maximum price permitted under the aforesaid Emergency Price Control Act of 1942 and the aforesaid Maximum Price Regulations Nos. 148, 165, 169 and 239;

g. That the said defendants would and would cause others to issue various checks, notes, and other evidence of payments, loans, collections, transfers and receipts which did not in truth and in fact represent the true and actual transactions between the parties, but were fictitious and fraudulently made and transferred and entered on the books and records of the aforesaid defendants for the purpose of concealing their other aforementioned illegal activities, in violation of the aforesaid Price Control Act of 1942, and aforesaid Maximum Price Regulations Nos. 148, 165, 169 and 239.

h. That the said defendants would persuade and cause others to persuade diverse persons to make various false and untrue and fraudulent entries upon the records of the said diverse persons for the purpose of concealing the aforesaid illegal activities of the said defendants;

i. That the said defendants would engage in any and all similar and dissimilar schemes, tricks, falsifications and methods of their aforesaid illegal activities as might occur to them

and others from time to time, in violation of the aforesaid Emergency Price Control Act of 1942, and the aforesaid Maximum Price Regulations Nos. 148, 165, 169 and 239;

j. That in carrying out the purposes and objects of this conspiracy, the said defendants would operate under and as various [196] organizations, including Southern California Meat Company, No. 2 and Central Packing Company;

k. That each of the said defendants would share in all gains and profits flowing and accruing from any and all of the above described illegal activities;

3. That in furtherance of and to effectuate the purposes and objects of said conspiracy, the said defendants at the times and places hereinafter set forth, within the jurisdiction of this Court, committed the following overt acts:

(a) On or about June 30, 1944 the defendants prepared Southern California Meat Co., Invoice No. 14942 showing a charge of \$100.00 for "slaughtering";

(b) On or about July 7, 1944, the defendants prepared Southern California Meat Co., Invoice No. 14985 showing a charge of \$422.00 for "slaughtering";

(c) On or about July 13, 1944 the defendants prepared Southern California Meat Co., Invoice No. 15076 showing a charge of \$26.00 for "slaughtering";

(d) On or about July 14, 1944 the defendants prepared Southern California Meat Co., Invoice No. 15095 showing a charge of \$65.00 for "slaughtering";

(e) On or about July 21, 1944 the defendants prepared Southern California Meat Co., Invoice No. 15173 showing a charge of \$136.00 for "slaughtering";

(f) On or about July 28, 1944 the defendants prepared Southern California Meat Co., Invoice No. 15251 showing a charge of \$171.00 for "slaughtering";

(g) On or about July 28, 1944 the defendants prepared Southern California Meat Co., Invoice No. 15249 showing a charge of \$62.00 for "slaughtering";

(h) On or about August 1, 1944 the defendants prepared Southern California Meat Co., Invoice No. 15268 showing a charge of \$392.70 for slaughtering"; [197]

(i) On or about August 8, 1944, the defendants officially began operating under the firm name and style of Southern California Meat Co., No. 2;

(j) On or about December 29, 1944, the defendants accepted \$144.00 from M. N. Sample;

(k) On or about January 1, 1945, the defendants officially began operating under the firm name and style of Central Packing Company;

(l) On or about January 5, 1945, the defendants accepted \$165.00 from H. N. Sample;

(m) On or about January 5, 1945, the defendants issued Southern California Meat Co., No. 2 Invoice No. 7733;

(n) On or about January 19, 1945, the defendants accepted \$143.00 from H. N. Sample;

(o) On or about January 9, 1945, the defendants issued Southern California Meat Co., No. 2, Invoice No. 7887;

(p) On or about February 7, 1945, the defendants issued Central Packing Co., Invoice No. 165;

(q) On or about March 30, 1945, the defendants issued Central Packing Co., Invoice No. 1832;

(r) On or about March 30, 1945, the defendants issued Central Packing Co., Invoice No. 1831; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [198]

Count 2

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 25th day of October, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and

Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Courtesy Market—Meuhlberger, certain meat items, to wit: Grade A beef, Grade A veal, as shown on Invoice No. 6109 of the Southern California Meat Co., No. 2, for a price per pound which was, as the said defendants then and there well know, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulation then was: for Grade A beef, 21 cents a pound; for Grade A veal, 21¾ cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [199]

Count 3

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 25th day of October, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree

to sell and did sell to William Meuhlberger certain meat items, to wit: Grade A beef as shown on Invoice No. 6034 of the Southern California Meat Co., No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A beef, 21 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [200]

Count 4

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 21st day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Clover Meat Co., certain meat items, to wit: Grade A beef, Grade A veal and Grade B veal as shown on Invoice No. 1505 of the Central Packing Co., for a price per pound which

was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A beef, 20¾ cents a pound; contrary to the form of the statute in such case under and provided and against the peace and dignity of the United States of America. [201]

Count 5

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 21st day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Clover Meat Co., certain meat items, to wit: Grade A beef as shown on Invoice No. 607 of the Central Packing Co., for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under

the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A beef, 20¾ cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [202]

Count 6

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 14th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Clover Meat Co., certain meat items, to wit: Grade A beef, as shown on Invoice No. 389 of the Central Packing Co., for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was:

for Grade A beef, 20 $\frac{3}{4}$ cents per pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [203]

Count 7

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 28th day of November, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Club Market certain meat items, to wit: Grade A beef as shown on Invoice No. 6902 of the Southern California Meat Co., No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A beef, 21 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [204]

Count 8

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 28th day of November, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Club Market certain meat items, to wit: Grade A beef as shown on Invoice No. 6903 of the Southern California Meat Co., No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A beef, 21 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [205]

Count 9

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 29th day of September, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Club Market certain meat items, to wit: Grade A beef as shown on Invoice No. 5427 of the Southern California Meat Co., No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A beef, 21 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [206]

Count 10

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 19th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Club Market certain meat items, to wit: Grade B beef, as shown on Invoice No. 479 of the Central Packing Company for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: Grade B beef, 19 cents per pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [207]

Count 11

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 19th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Club Market certain meat items, to wit: Grade A beef as shown on Invoice No. 1368 of the Central Packing Company for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A beef, 20¾ cents per pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [208]

Count 12

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 27th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 1666 of the aforesaid Central Packing Company showing a sale of Grade B beef at 18¾ cents a pound, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [209]

Count 13

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 26th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 718 of the aforesaid Central Packing Company showing a sale of Grade A beef at 20 $\frac{3}{4}$ cents a pound, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [210]

Count 14

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 29th day of January, 1945, in the City of Los Angeles, County of Los Angeles,

State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 8377 of the aforesaid Central Packing Company showing a sale of Grade A beef at 21 cents a pound and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [211]

Count 15

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 13th day of October, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or

cause to be made an entry false in a material respect upon Invoice 5736 of the aforesaid Southern California Meat Company No. 2 showing a sale of Grade A beef at 21 cents a pound, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry; and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [212]

Count 16

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 5th day of July, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to H. N. Sample certain slaughtering services, to wit, slaughtering of 13 head of beef, as shown on Invoice No. 14967 of the Southern Califor-

nia Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [213]

Count 17

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 15th day of August, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to H. N. Sample certain slaughtering services, to wit, slaughtering of 39 head of beef, as shown on Invoice No. 15456 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering

permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [214]

Count 18

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 5th day of July, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Model Meat Co., certain slaughtering services, to wit, slaughtering of 28 head of beef, as shown on Invoice No. 14965 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the

provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [215]

Count 19

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 21st day of July, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Salter Meat Co., certain slaughtering services, to wit, slaughtering of 37 head of beef, as shown on Invoice No. 15168 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00);

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [216]

Count 20

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 24th day of July, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Salter Meat Co. certain slaughtering services, to wit, slaughtering of 31 head of beef, as shown on Invoice No. 15188 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [217]

Count 21

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 16th day of August, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Salter Meat Co., certain slaughtering services, to wit, slaughtering of 26 head of beef, as shown on Invoice No. 15472 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One Dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [218]

Count 22

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 25th day of August, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to H. N. Sample certain slaughtering services, to wit, slaughtering of 49 head of beef, as shown on Invoice No. 15565 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One Dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [219]

Count 23

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 16th day of August, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Model Meat Co., certain slaughtering services, to wit, slaughtering of 24 head of beef, as shown on Invoice No. 15471 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [220]

Count 24

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 25th day of August, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Model Meat Co., certain slaughtering services, to wit, slaughtering of 33 head of beef, as shown on Invoice No. 15564 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [221]

Count 25

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present :

That on or about the 5th day of July, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Salter Meat Co., certain slaughtering services, to wit, slaughtering of 21 head of beef, as shown on Invoice No. 14966 of the Southern California Meat Co., Inc., for a price per head which was, as the said defendants then and there well knew, in excess of the maximum price for said slaughtering permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per head under the aforesaid Act and regulation then was: One dollar (\$1.00) ; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [222]

Count 26

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 28th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Dana & Roberts certain meat items, to wit: Grade A beef as shown on Invoice No. 821 of the Central Packing Co., for a price per pound which was, as the defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was \$20.75; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [223]

Count 27

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present :

That on or about the 15th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon cash received journal of the aforesaid Central Packing Company showing payment of only \$6931.22 by Vernon Hotel & Restaurant Supply Co., on account of meat purchases by the latter, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [224]

Count 28

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 2nd day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 952 of the aforesaid Central Packing Company, showing a sale of Grade A beef at 19 cents a pound; and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [225]

Count 29

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present :

That on or about the 15th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon cash received journal of the aforesaid Central Packing Company showing a loan to said Company of \$2294.01 by defendant, Lou Segal, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [226]

Count 30

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 16th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon cash received journal of the aforesaid Central Packing Company showing a payment of only \$2918.55 by Vernon Hotel & Restaurant Supply Co., on account of meat purchases by the latter, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [227]

Count 31

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present :

That on or about the 16th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon cash received journal of the aforesaid Central Packing Company showing a loan by defendant Hyman Stillman of \$2235.50 to said company, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [228]

Count 32

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 31st day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon the general ledger of the aforesaid Central Packing Company showing total receipts of \$1,236,119.64, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [229]

Count 33

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 18th day of May, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon cash received journal of the aforesaid Southern California Meat Co., Inc., showing receipt on May 18, 1945, of \$1,420.00 from H. N. Sample, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 165, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [230]

Count 34

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 18th day of May, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon cash received journal of the aforesaid Southern California Meat Co., Inc., showing receipt on May 18, 1945, of \$3,468.42 from Salter Meat Co. and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 165, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [231]

Count 35

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present :

That on or about the 13th day of October, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon check register of the aforesaid Southern California Meat Co., No. 2, showing the issuance of a check by said company to B. Turner on October 13, 1944, in payment of a loan, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148, 165, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [232]

Count 36

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 10th day of April, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon the general ledger of the aforesaid Central Packing Company showing cash sales of \$131,666.73 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulations 169, 239 thereunder which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [233]

Count 37

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 24th day of September, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon invoice 5110 of the aforesaid Southern California Meat Co. No. 2 showing a total sum charged of \$174.23 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [234]

Count 38

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 6th day of October, 1944, in the City of Los Angeles, County of Los Angeles,

State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon a statement of the aforesaid Southern California Meat Co. No. 2 showing total charges of \$356.60 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America [235]

Count 39

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 22nd day of September, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a

material respect upon a statement of the aforesaid Southern California Meat Co. No. 2 showing total charges of \$1,129.86 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [236]

Count 40

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 12th day of December, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon invoice 7251 of the aforesaid Southern California Meat Co. No. 2 showing a sale of 1 Grade A beef for the sum of \$91.30 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said

defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [237]

Count 41

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 17th day of January, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon invoice 8135 of the aforesaid Southern California Meat Co. No. 2 showing a sale of two grade A veal for the sum of \$116.53 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant

to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [238]

Count 42

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 18th day of December, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon invoice 7413 of the aforesaid Southern California Meat Co. No. 2 showing a sale of 1 grade A beef for the sum of \$154.38 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [239]

Count 43

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 20th day of December, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon invoice 7456 of the aforesaid Southern California Meat Co. No. 2 showing a sale of 2 grade A veal for the sum of \$100.23 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [240]

Count 44

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 28th day of December, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal did wilfully and unlawfully make or cause to be made an entry false in a material respect upon invoice 7579 of the aforesaid Southern California Meat Co. No. 2 showing a sale of 5 grade B veal, for the sum of \$226.98 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [241]

Count 45

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 13th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Dana & Roberts certain meat items, to wit: Grade A beef as shown on Invoice No. 1201 of the Central Packing Company for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: \$20.75 per hundred pounds; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [242]

Count 46

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 20th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Dana & Roberts certain meat items, to wit: Grade A beef as shown on Invoice No. 573 of the Central Packing Company for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: \$20.75 per hundred pounds; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America. [243]

Count 47

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 31st day of August, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Dana & Roberts certain meat items, to wit: Grade A veal, Grade B veal as shown on Invoice No. 18263 of the Southern California Meat Co. No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: \$21.50 per hundred pounds for Grade A veal; \$19.50 per hundred pounds for Grade B veal; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [244]

Count 48

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 27th day of September, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Dana & Roberts certain meat items, to wit: 3 veal, grade A as shown on Invoice No. 5387 of the Southern California Meat Co. No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: \$21.50 per hundred pounds; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [245]

Count 49

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 31st day of October, 1944, in the City of Los Angeles, County of Los Angeles,

State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A. Segal, doing business as aforesaid wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Dana & Roberts certain meat items, to-wit: 3 veal, grade A, as shown on Invoice No. 6238 of the Southern California Meat Co., No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the Said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: \$21.50 per hundred pounds; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [246]

Count 50

(50 U.S.C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 6th day of December, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants Southern California Meat Company, Inc., Charles M. King, Hyman Stillman and Lou A Segal, doing business as aforesaid wilfully

and unlawfully did offer, solicit, attempt and agree to sell and did sell to Dana & Roberts certain meat items, to-wit: 3 veal, Grade B as shown on Invoice No. 7073 of the Southern California Meat Co., No. 2 for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: \$19.50 per hundred pounds; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHARLES H. CARR,

United States Attorney.

A true bill,

/s/ JOHN D. BOYLE,

Foreman.

Bail, \$10,000 each individual defendant.

[Endorsed]: Filed March 11, 1946 [248]

At a stated term, to-wit: The February Term. A. D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 25th day of June in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable J. F. T. O'Connor,
District Judge.

[Title of Cause.]

MINUTE ORDER, JUNE 25, 1946

This cause coming on ex parte; Norman Neukom, Esq., Assistant U. S. Attorney, appearing for the Government; Wm. Strong, Esq., Special Attorney, War Frauds Unit, being present; and the defendant Chas. M. King being present with his attorney, James A. McLaughlin, Esq.; Samuel Goldstein, Court Reporter, being present and reporting the proceedings:

Attorney Neukom informs the Court that the defendant Chas. M. King, and Charles M. King as president of the defendant Southern California Meat Co., desires to change his plea of not guilty to counts 16 to 20 as to defendant King individually, and counts 16 to 25, inclusive, and count 33 as to defendant Southern California Meat Co., whereupon, on motion of defendant Charles M. King, individually, and Charles M. King as president of Southern California Meat Co., the said defendant is allowed to change his plea from not guilty to counts to guilty, and upon being required to plead defendant Charles M. King individually enters his plea of guilty to counts 16 to 20, inclusive and defendant King as president of Southern California Meat Co. enters plea of said defendant company of guilty to counts 16 to 25, inclusive, and count 33 of the indictment herein; whereupon, on motion of Attorney McLaughlin, it is ordered that at the conclusion of the trial of the other defend-

ants herein the case of the defendant King be referred to the Probation Officer for investigation and report and that the presence of the defendant King be waived at the trial of the other defendants, scheduled to go to trial June 26, 1946. [249]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 19138

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and

PHILLIP HIMMELFARB,

Defendants.

NOTICE OF APPEAL TO CIRCUIT
COURTS OF APPEALS

Name and address of appellant—Phillip Himmel-
farb, 565 West Cole, Downey, California;

Name and address of Appellant's attorney—
William Katz, 415 Chester Williams Building, 215
West Fifth Street, Los Angeles 13, California;

Offense—Alleged violation of Section 145 (b)
Internal Revenue Code, 26 U.S.C. 145 (b)—(at-
tempt to evade income taxes);

Judgment and sentence—Upon verdict of the jury that the defendant Phillip Himmelfarb was guilty of the offense alleged in Count II of the indictment, said defendant was, on the 16th day of June, 1947, sentenced to imprisonment for one year and one day in an institution of the penitentiary type to be selected by the Attorney General.

An order was made on the 16th day of June, 1947, denying [250] the motion of defendant Phillip Himmelfarb for judgment notwithstanding the verdict, and motion made in the alternative for a new trial.

That defendant Phillip Himmelfarb is presently on bail under motion for stay of execution.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment, sentence and order.

Dated, at Los Angeles, California, this 18th day of June, 1947.

/s/ WILLIAM KATZ,

Attorney for Appellant.

Received copy of the within this 19th day of June, 1947.

/s/ JAMES M. CARTER,

United States Attorney.

/s/ WM. STRONG,

Asst. United States Attorney.

[Endorsed]: Filed June 19, 1947. [252]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
CIRCUIT COURT OF APPEALS

Name and address of appellant—Sam Ormont, 407 North Cornwell Street, Los Angeles 33, California;

Names and addresses of Appellant's attorneys—Daly B. Robnett and Benjamin F. Kosdon, 1007 Spring Arcade Building, 541 South Spring Street, Los Angeles 13, California;

Offense—Alleged violation of Section 145 (b) Internal Revenue Code, 26 U.S.C. 145 (b)—(attempt to evade income taxes);

Judgment and sentence—Upon verdict of the jury that the defendant Sam Ormont was guilty of the offense alleged in Count I of the indictment, said defendant was, on the 16th day of June, 1947, sentenced to imprisonment for one year and one day in an institution of the penitentiary type to be selected by the Attorney General.

An order was made on the 16th day of June, 1947, denying the motion of defendant Sam Ormont for judgment notwithstanding the [253] verdict, and motion made in the alternative for a new trial.

That defendant Sam Ormont is presently on bail under motion for stay of execution.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment, sentence and order.

Dated at Los Angeles, California, this 24th day of June, 1947.

BENJAMIN F. KOSDON and
DALY B. ROBNETT,

By /s/ BENJAMIN F. KOSDON,
Attorneys for Appellant.

Received copy of the within Notice of Appeal to Circuit Court of Appeals this 24th day of June, 1947.

/s/ JAMES M. CARTER,
U. S. Attorney.

By /s/ VELOVIS BARKUS,
Attorney for Plaintiff.

[Endorsed]: Filed June 24, 1947. [255]

[Title of District Court and Cause.]

**ORDER TO TRANSMIT ORIGINAL
EXHIBITS ON APPEAL**

Upon the reading and filing of the Affidavit of Benjamin F. Kosdon and Daly B. Robnett, and good cause appearing therefor,

It Is Hereby Ordered that all original exhibits received in evidence in the above-entitled action be sent to the United States Circuit Court of Appeals, in and for the Ninth Circuit, pursuant to Rule 75 i of the Federal Rules of Civic Procedure, in connection with the appeal taken by defendant Sam Ormont, and that the Clerk of this Court make provision for the safekeeping, transportation and return thereof, as may be proper and necessary.

Dated at Los Angeles, California, this 26th day of June, 1947.

/s/ C. E. BEAUMONT,

Judge of the District Court.

Received copy of the within Order to Transmit Original Exhibit on Appeal this 26th day of June, 1947.

/s/ JAMES M. CARTER,

U. S. Attorney.

By /s/ VELOVIS BARKUS,

Attorney for Plaintiff.

[Endorsed]: Filed June 26, 1947. [260]

[Title of District Court and Cause.]

ORDER TO TRANSMIT
ORIGINAL EXHIBITS ON APPEAL

Upon the reading and filing of the Affidavit of William Katz, and good cause appearing therefor,

It Is Hereby Ordered that all original exhibits received in evidence in the above-entitled action be sent to the United States Circuit Court of Appeals, in and for the Ninth Circuit, pursuant to Rule 75 i of the Federal Rules of Civic Procedure, in connection with the appeal taken by defendant Phillip Himmelfarb, and that the Clerk of this Court make provision for the safekeeping, transportation and return thereof, as may be proper and necessary.

Dated at Los Angeles, California, this 24th day of June, 1947.

/s/ C. E. BEAUMONT,

Judge of the District Court.

[Endorsed]: Filed June 24, 1947. [263]

[Title of District Court and Cause.]

APPELLEE'S COUNTERDESIGNATION
OF RECORD ON APPEAL

Appellants Sam Ormont and Phillip Himmelfarb having heretofore filed separate Designations of Record on Appeal, the United States of America hereby designates the following additional portion of the record proceedings and evidence to be included in the Record on Appeal:

1. All the proceedings had in this trial, including all the matter taken down by the reporters either in open court, or in the chamber of Judge Peirson M. Hall.

2. All the opening and closing arguments of all counsel in the case, including counsel for defendants Sam Ormont and Phillip Himmelfarb; all argument and discussion pertaining to all instruction both requested and denied, and requested and given.

JAMES M. CARTER,
United States Attorney.

ERNEST A. TOLIN,
Assistant U. S. Attorney

WILLIAM STRONG,
Assistant U. S. Attorney

By /s/ WILLIAM STRONG,
Attorney for Plaintiff-
Appellee.

[Affidavit of Service by Mail]

[Endorsed]: Filed July 2, 1947.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 285, inclusive, contain full, true and correct copies of Indictment; Motion of Each Defendant to Dismiss; Motion of Each Defendant for a Bill of Particulars; Minute Order Entered March 12, 1947; Order on Motions of Defendants to Dismiss the Indictment and for a Bill of Particulars; Bill of Particulars; Minute Order Entered March 28, 1947; Notice of Motion to Consolidate Cases for Trial; Points and Authorities in Support of Motion to Consolidate Cases for Trial; Minute Order Entered May 14, 1947; Instructions Requested by Both Defendants; Minute Order Entered June 13, 1947; Verdict; Motion for Acquittal and for New Trial; Minute Order Entered June 16, 1947; Judgment and Commitment as to Each Defendant; Application and Motion for Immunity and for Order Barring Further Prosecution of Defendant Sam Ormont filed in case No. 19094-Crim.; Indictment filed in case No. 18,366-Crim., entitled United States of America, Plaintiff vs. Southern California Meat Company, Inc., et al, Defendants; Minute Order Entered June 25, 1946 in case No. 18,366-Crim.; Notice of Appeal of Each Defendant; Affidavit and Order for Transmittal of Original Exhibits as to Each Defendant; Designation of Record on Appeal and Statement of Points

on Appeal as to Each Defendant; Appellee's Counter-Designation of Record on Appeal; Supplement to Designation of Record on Appeal, etc., and Two Stipulations and Orders Extending Time to File the Record on Appeal which, together with Original Plaintiff's Exhibits and Original Defendants' Exhibits and copy of Reporter's Transcript of Proceedings on May 21, 22, 23, 26, 27, 28, and 29, 1947; June 3, 4, 5, 6, 10, 11, 12, 13 and 16, 1947; Partial Transcript of Proceedings before the Grand Jury on October 10, 1945 and Reporter's Transcript of Proceedings on May 19, 20 and 26, 1947 in the case of U. S. A., vs. Sam Ormont et al No. 19094-Criminal, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount of \$66.50, one-half of which has been paid by each of the defendants.

Witness my hand and the seal of said District Court this 9th day of September, A. D. 1947.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

Before the Grand Jury of the United States in
and for the Southern District of California,
Central Division.

In the Matter of
SOUTHERN CALIFORNIA MEAT
COMPANY, et al:

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California, October 10, 1945.

SAMUEL ORMONT

called as a witness before the Grand Jury, having
been first duly sworn by the Foreman, was examined
and testified as follows:

Examination

By Mr. Strong:

Q. Your name is Samuel Ormont?

A. Yes.

Q. What is your address?

A. The business address is Imperial Highway at
Culver Avenue, Southgate, California.

Q. What is your home address?

A. 407 North Cornell Street, Los Angeles.

Q. What is the name of the business you
operate? A. Acme Meat Company.

Q. How long have you been operating under
that name? A. Approximately 15 years.

Q. You are the sole owner of that business?

A. Yes.

(Testimony of Samuel Ormont.)

Q. Did you at any time operate on the premises of the Southern California Meat Company?

A. Yes.

Q. When was that?

A. Starting approximately May 1st, 1944, until approximately the end of December, 1944.

Q. And what did you have there, an office?

A. I had an office there, yes, on the dock.

Q. What was your business there?

A. You mean type of business?

Q. Yes. A. Wholesale meats.

Q. Did you have your cattle slaughtered by Southern California Meat Company?

A. Yes.

Q. You would bring in the cattle and they would slaughter them? A. Yes.

Q. You paid a service charge for the slaughtering? A. Yes.

Q. How much was that?

A. \$1.00 per beef and \$1.00 for calves.

Q. Calves were the same as beef?

A. The same.

Q. The California Meat Company, the Southern California Meat Company, I should say, kept certain parts of the carcasses, didn't they?

A. They didn't keep any parts of the carcasses. They kept part of the inedible portion of the animal.

Q. The carcass is all you got? A. Yes.

Q. They got the various other parts of the animals?

A. They got the inedible parts of the animal.

(Testimony of Samuel Ormont.)

Q. That was part of the charge for the slaughtering, the dollar and parts plus the dollar?

A. I do not know whether it was a charge; they got them, anyway.

Q. You paid an additional dollar per head?

A. Yes.

Q. All right, now, tell us what you got for the dollar from the time you brought the animal to the pen until you got it back.

A. According to the way they had the thing set up, the dollar was the actual slaughtering charge for the actual slaughtering of the animal, just the killing.

Q. You were told that was all?

A. When I came there I didn't know what the set-up was.

Q. Explain that. A. In what respect?

Q. As to what you were paying the one dollar for. A. For the killing of the animal.

Q. At what stage did you have to come in and do your own work?

A. Actually the only thing else we performed was the selling of the animals.

Q. From the time it came in alive, to the pen to the time you got the carcass ready for sale, that is all the service in between you got for the one dollar?

A. I don't know whether those were all services or not; there were other services involved, that came up later on, and those services were not included in the dollar charged for the slaughtering.

(Testimony of Samuel Ormont.)

Q. That is what you were told?

A. It wasn't what I was told; it was the way the thing was handled. I was not told anything.

Q. Explain what you mean by that.

A. We had a service charge of a dollar for the actual service, and there were some other plant charges that constituted stamping of the meat, handling the beef out of the hot boxes after the cattle were slaughtered, and the beef rolled out and loaded onto trucks for us; sometimes we were granted additional rail space; sometimes extra cattle were handled at the yards and fed for several days, sometimes eight or ten days, before actual slaughter; and there were several men killing at the same time; and sometimes before our turn came we had seven, eight or ten days to wait before our animals were slaughtered; and they would unload, water and feed the cattle and take care of that; and when they would grant us the use of their trucks and delivery services, they would be recompensed for the extra services.

Q. You mean they charged you first and gave you the trucks later?

A. No, after the animals were slaughtered and in the hot boxes——

Q. Isn't what you mean this: When you had your cattle slaughtered you got an invoice showing how many head at any time you had slaughtered for a dollar each?

A. Yes.

Q. And the total number of dollars?

A. Yes.

(Testimony of Samuel Ormont.)

Q. That was for slaughtering? A. Yes.

Q. You got an invoice or request from them usually for some sum of money?

A. Yes.

Q. And what was that additional money for?

A. That was for those additional charges, the services.

Q. Did you get those services?

A. Yes, the services were performed.

Q. Were you present when the services in each instance were performed?

A. No, part of my days was out buying, and I wasn't around here all the time; I was away on mornings, and that is when they would be performed—the animals slaughtered at night and pushed out of the hot boxes the next morning into the main selling coolers.

Q. Is that the services you are talking about?

A. One type of service.

Q. Did you have to pay any rent down there?

A. No exact rent charged except occasionally there would be rail space, additional space; that would come in on the extra charges.

Q. Did you pay rent for the rails?

A. The rails were charged on these additional charges; we would have rail space, but when our rails became overcrowded we used extra rail space; and we paid additional charges for that, I don't know just how much.

Q. I want to get this straight. I want you to tell us what you know about it or what you were told by Mr. King about it.

(Testimony of Samuel Ormont.)

A. I said that I was away part of the time, but at certain intervals, like afternoons, I had, for instance, two rails, using two rails in the plant, and, say, if I used four rails, then I was using extra space.

Q. Did you pay rental for the two rails?

A. There was a charge for it.

Q. For the first two?

A. No, not for the actual rails; I had no additional charges for that.

Q. You got, you said, two rails——

A. Two, we used always.

Q. And the cooler, was that before or after the hot box?

A. I don't know what you mean by before or after.

Q. The cooler, that is, where your animals or carcasses were brought.

A. That is after the animals are slaughtered, they were rolled out of the hot box into the main box.

Q. So that the Grand Jury can understand, tell them what happened to the animals after they are brought into the pens. They got through the slaughtering room?

A. You mean the entire operation?

Q. In general.

A. The procedure ordinarily is that the animals are brought in to the Union Stockyards. The animals are brought in, unloaded at the plant, and yarded into individual pens. And sometimes they

(Testimony of Samuel Ormont.)

remain there several days, sometimes they are ready for immediate slaughter, and when the animals are slaughtered, they do the slaughtering; they are tagged for identification, because they have to have some means of identification, and when the animals then are slaughtered, they come in the hot boxes; they would ordinarily remain over night and early the next morning be assigned to our rails, or to the rails of the particular owner; and our two rails we had were the last two rails in the box, and that would be where the animals would be, should be, before the next procedure, which would be the selling cooler.

Q. The place they stopped before that, that is another cooler—— A. I don't understand.

Q. The hot box is the cooler or the room in which they are hung to lose the body heat?

A. Yes.

Q. When they lost the body heat and came down to a certain degree of temperature, they were moved in the cooler?

A. In the selling cooler.

Q. In the selling cooler you had two rails?

A. Yes.

Q. Any other rails you had were an extra charge? A. Yes.

Q. Was it stated on there what it was for?

A. No, just a similar form set up for all the services inclusive.

A Grand Juror: Was that by the head?

The Witness: The slaughtering, yes.

(Testimony of Samuel Ormont.)

A Grand Juror: The extra service?

The Witness: No, as a matter of fact, I wouldn't know definitely what each particular animal was assessed for the extra charges; the bills were presented and paid as such.

A Grand Juror: You said when you left your cattle there seven or eight days Mr. King fed and watered them?

The Witness: Yes.

A Grand Juror: You paid for the feed?

The Witness: We have our own feed up there, but they would furnish the men to feed the cattle.

A Grand Juror: How many times did that happen?

The Witness: That happened several days in the nine months I was there; it happened consistently, there was sometimes a period of time of four to ten days that would expire before the animals were slaughtered.

Q. (By Mr. Strong): Did you pay for these extra charges by check?

A. They were handled in two ways. Originally they were made out in checks, and some of the checks were made to the Southern California Meat Company, and others were made out to cash.

Q. Why were they made out to cash?

A. They asked for it in that manner.

Q. Who asked for it? A. Mr. King.

Q. Did you ask him why he wanted the checks made to cash? A. No.

(Testimony of Samuel Ormont.)

Q. How did you enter it on your books?

A. As paid to the Southern California Meat Company as additional charges.

Q. Without indicating what the charges were for?

A. We applied them to the account of slaughtering charges and to the incidental expenses.

Q. A certain part of those charges were for extra rail space?

A. Not charges definitely for rail space, but everything included.

Q. All right, tell us again the things you paid extra charges for.

A. Running the meat out of the hot box, stamping the beef, each particular cut; the cattle run onto the docks and loaded for us; and the use of the trucking equipment, and the unloading of the cattle and feeding and watering of the cattle in the yards until ready for slaughter.

Q. Do you recall between the period of June 1st and December 31st, 1944, how much you paid for these extra services.

A. No, not offhand, but I think it was between \$6500.00 and \$7000.00.

Q. Approximately \$7700.00?

A. I don't know.

Q. About how many head of cattle did you have slaughtered during that period of time?

A. I would estimate—we varied, because our kill was heavier when we first started slaughtering,

(Testimony of Samuel Ormont.)

and it gradually dwindled down, because I wasn't getting the slaughtering I did when I first went in the place.

Q. Would it be accurate to say you had about 4250 head of cattle between June 1st and December 31st? A. I don't know exactly.

Q. Your books would show?

A. The books would reflect how many, yes, because we have a complete record of that for all purposes.

Q. You kept accurate records?

A. Yes, each animal that was slaughtered, we have a record of each animal.

A Grand Juror: Before you came to the packing plant did you pay those services at other plants?

The Witness: No, in another plant I was in I had to see the animals were handled, see to the finishing and skinning and everything else; I had to perform that work myself.

A Grand Juror: How did you know the service charges you paid were not out of line?

The Witness: Personally I wouldn't know; I couldn't tell; I had no method of determining that, because I have been in business several years, and when I first started in July in 1930, I paid as high as \$3.00 a beef to have the actual slaughtering performed and I did all the other services myself, including the stacking of the beef, and everything else.

A Grand Juror: How did you know these extra charges were correct?

(Testimony of Samuel Ormont.)

The Witness: I had no way of determining it, because I had to be satisfied with whatever was presented to me; it was my last recourse; that was the last packing plant here that was performing outside custom slaughtering.

A Grand Juror: You had no way of actually knowing what services you did get?

The Witness: Except what we knew was actually performed.

Q. (By Mr. Strong): Did any of the others pay any rental space for extra rails?

A. I couldn't tell, I never interfered or knew what happened to the other man; I had my own business to take care of.

Q. Who told you part of these charges were for the extra rail space?

A. As the bill was presented—I know one instance where a man had an entire cooler, paid a rental, and we used part of that at times after he had moved out of that cooler, and at times we had to use it, and I imagine part of that was charged, because——

Q. When the bills were presented to you did they say extra cooler space, rail space?

A. No.

Q. I am trying to find out how you knew you were paying for extra cooler space?

A. Before we could use space we had to check through the office.

Q. Did the office say you had to pay rental?

A. You don't get anything gratis around any packing plant.

(Testimony of Samuel Ormont.)

Q. As a matter of fact, you paid all the charges presented to you because you wanted to stay in business and you were going to pay whatever was asked? A. Yes.

Q. You do now know, as a matter of fact, what services were rendered, were rendered to you, which you paid——

A. I couldn't prorate them, if that is what you mean, and there wouldn't be any particular service at any particular price.

Q. Did you discuss this problem of what was being given to you for the extra charges, did you discuss this with Mr. King?

A. No, because the bills were presented and I made the checks, and I very seldom went in their office.

Q. You did not learn from Mr. King that you were paying for extra cooler or extra rail space and cooler and other things?

A. I had very few conversations with Mr. King.

Q. You said you paid rental—you paid for cooler space, for extra rails, because you had your carcasses hanging on extra rails, besides the two assigned to you? A. Yes.

Q. When did you leave the premises of Southern California Meat Company?

A. I believe our last day was December 29, 1944.

Q. How did you happen to leave there?

A. I started looking for another place in September, 1944. I was trying to negotiate for a little packing plant. Gradually we were getting freezed

(Testimony of Samuel Ormont.)

out, it seemed like there was quite a bit of favoritism going on, and other men were getting a heavier slaughter; every time we bought cattle we would have to put them in the yard for several days, and we couldn't operate under that condition; and I started looking around, gradually got myself lined up at another plant.

Q. You were actually told to get out?

A. No, I got out before the squeeze came on. We were slaughtering seven or eight hundred cattle a month, and it was gradually was coming down to about 45 or 50 a week, and we were being cut down 25 per cent of our business.

Q. Who was doing the squeezing?

A. Whoever had control of the slaughter.

Q. You said you saw a lot of squeezing of somebody.

A. Well, we would come into the office and tell them we got so many cattle to slaughter, and they handled them in some way; we would itemize the kill and try to allocate them in some way so that we would get some slaughter so that we wouldn't be out of business entirely; and instead of getting a normal amount, they kept cutting down so that before we knew it we had very little slaughter.

Q. Whose cattle were being slaughtered?

A. The Economy Meat Company.

Q. Who were really the ones getting the slaughter? You said they were squeezing you.

A. The California Meat Company, and outfit in there, and Southern California Meat Company

(Testimony of Samuel Ormont.)

No. 2, and Salter Meat Company, and Harry Sample, we were all on a par. It seems as though the associates were Southern California Meat Company No. 2 and California Meat Company.

Q. California Meat Company was the one doing the slaughtering?

A. No, there was Southern California Meat Company that had control of the plant; Southern California Meat Company No. 2 was the big slaughterer, and Southern California Meat Company slaughtered——

Q. Who was Southern California Meat Company No. 2?

A. I don't know; it was operated in some way, some sort of management; two men handled it, and I don't know exactly what the intricacies were.

Q. Who were they?

A. Hyman Stillman and Lou Siegel.

Q. You moved out at the end of 1944?

A. My last day was December 29th.

Q. You entered all these payments you made both on the invoices which showed the number of head slaughtered? A. What?

Q. You entered on your books all charges made to you by Southern California Meat Company?

A. Yes.

Q. Did you make any payments to Southern California Meat Company after you left there?

A. Yes, I owed him one bill, and I paid it, I think one bill.

Q. About how much was that?

A. I think about \$135.00 or \$140.00.

(Testimony of Samuel Ormont.)

Q. Yours was the Acme Meat Company?

A. Yes.

Q. You said before you paid no rentals of any kind except for the rails?

A. That is right.

Q. Did you pay the Southern California Meat Company in February the sum of \$820.00?

A. I couldn't remember; I wouldn't know.

Q. Also the sum of \$914.00 the same day, and also \$1021.00, making a total of about \$2700.00?

A. I couldn't tell unless I would see the records.

Q. This was after you left?

A. I wouldn't know.

Q. You just said the only payment you made was \$100.00?

A. \$135.00 after I left.

Q. This \$135.00 was the only payment you made after you left?

A. That was the only payment I remember.

Q. You don't recall making a payment of \$2700.00 in February?

A. No.

Q. If you did pay it you would know, wouldn't you?

A. That is a pretty substantial sum.

Q. If you paid that sum in one day you would recall it?

A. I think so.

Q. The day is February 9th, 1945. Do you recall three sums, that is, \$820.00 and \$914.00 and \$1021.00?

A. I don't remember anything like that in February.

Q. Don't you remember?

A. No.

(Testimony of Samuel Ormont.)

Q. You did not owe them any rent of any kind?

A. No, I think I was pretty well cleared up on the last payment.

Q. The last payment was for the services——

A. Extra services, I believe.

Q. The same kind you were testifying to?

A. Yes.

Q. You did not in February, 1945, make any payments for rent to Southern California Meat Company? A. No, not that year.

Q. Did you ever make payments for rent to Southern California Meat Company before that?

A. Except the rail space, that would be the only rental.

Q. That would show on the invoices that said slaughtering or something? A. Yes.

Q. You discussed your relations with Southern California Meat Company with Mr. Ward and Mr. Wells, of the O.P.A.? A. Yes.

Q. You told them everything that happened?

A. Yes.

Q. Everything you told them was the truth?

A. Exactly what I am telling you.

Q. You did discuss it in detail with them?

A. Yes, very much so.

Mr. Strong: Are there any questions?

Q. (By Mr. Veale): You mean to say up to the time you went in business down there you had never paid any such excessive charges?

A. As which?

(Testimony of Samuel Ormont.)

Q. As these extra invoices you paid, extra services? A. I don't understand.

Q. Up to the time you went in business down there at this place, you had never paid any extra charges for slaughtering?

A. I don't know what you mean by extra charges.

Q. These invoices.

A. For additional services and whatever was presented to me.

Q. Had you ever paid any such charges before, anywhere? A. Not that I remember.

Q. You went in business there and the very first bill that was rendered to you was the one dollar slaughter per head? A. Yes.

Q. And the next bill presented to you was for an additional amount? A. Yes.

Q. You mean to tell us that you never questioned that?

A. No, I didn't, and I was in two different packing companies and I had been eliminated in my business, and I wanted to remain in business, and I didn't question it.

Q. You wanted to make a profit? A. Yes.

Q. Let us assume you had 200 cattle come in and they billed you \$200.00 for the slaughtering?

A. Yes.

Q. And they billed you for \$400.00 for extra slaughtering charges; you paid it?

A. I wouldn't know whether——

Q. Did you pay it? Answer the question.

A. I paid what?

(Testimony of Samuel Ormont.)

Q. They had billed you \$400.00 extra slaughtering charge, you would have paid it?

A. If you state the question properly, maybe I can answer it.

Q. Let us assume a kill of 200 cattle at this particular time. A. Yes.

Q. After the cattle had been killed they billed you, billed you for \$1.00 per head slaughtering.

A. Yes.

Q. Then, in addition to that, they billed you for extra slaughtering charges \$400.00.

A. You are attributing all of that to the actual slaughtering?

Q. I am asking you a question, if you didn't get a second invoice for \$400.00, in addition.

A. You mean I paid \$400.00.

Q. Yes. A. Yes.

Q. You did not ask anybody about that?

A. No.

Q. All right. The following week we will assume you had another kill of 200 and they billed you \$200.00, regular slaughtering charge, but they sent you a second bill for \$1000.00. Would you have paid that?

A. If the charges seemed excessive, I would have to stop my business immediately; I couldn't operate——

Q. Would you have paid that \$1000.00?

A. I couldn't have paid \$1000.00; I was not making that much money there.

(Testimony of Samuel Ormont.)

Q. You mean to say that at no time did you ever discuss these extra charges with anybody down there?

A. I never discussed them; they seemed within reason and I paid them.

Q. How did you find out or determine them to be correct——

A. I didn't find out, I didn't question any charges; I assumed they were in reason. In 1931 I was paying \$3.00 actual services——

Q. Suppose some stranger had walked in with an invoice for \$200.00, and you did not know anything about it. Would you pay it?

A. Not to a stranger.

Q. (By Mr. Strong): I show you some of these invoices, for instance, 14941, dated June 30th, 1944, Acme Meat Company, slaughter, \$548.00. That is not the type we are talking about, the extra charges?

A Grand Juror: In other words, you were paying the extra charges because you were able to stay in business?

The Witness: Absolutely, if I couldn't see my way clear I was going to get out.

A Grand Juror: Who owned the California Meat Company?

The Witness: I think originally California Meat Company was owned by G. D. Woodward.

Q. (By Mr. Veale): You did not know from one invoice to the next whether you were going to stay in business?

A. Absolutely, if it became excessive, I would stop operations.

(Testimony of Samuel Ormont.)

Q. During your entire operations there, from the time you went in to the time you went out, you never knew whether you were solvent or insolvent?

A. I never did go out of business.

A Grand Juror: Are you in business?

The Witness: Yes, I have my own plant.

A Grand Juror: Did you make money while at the Southern California Meat Company?

The Witness: Yes, we showed a nice profit.

Q. (By Mr. Strong): Take invoice 14941, Acme Meat Company, June 3d, 1944.

A. That is about the type.

Q. It says slaughtering, \$548.00. A. Yes.

Q. That was June 30th.

A. I don't remember any dates; it is to vague to remember, too far back to remember.

Q. According to this, on June 30th you paid \$548.00 in extra services, and on July 12th, 1944, you paid \$398.00 for extra services, according to this invoice?

A. Sometimes two might be together; sometimes I paid two weeks together.

Q. Did you ever receive any invoice that said anything else except slaughtering or what the extra charges were concerning?

A. I think that is all.

Q. Just a minute, the word slaughtering covered all so-called services?

A. That is correct.

A Grand Juror: What proportion of the price would this slaughtering charge of the carcass be.

(Testimony of Samuel Ormont.)

In other words, after you finally sold it to a butcher, what was, in round figures, what proportion of that sales price would be the slaughtering charges of \$1.00 a head be?

The Witness: The expense attributable to that?

A Grand Juror: Yes.

The Witness: Just the slaughtering, that is a very intricate question. It is subject to how cheap you buy the live animal; if we bought the animal cheap enough, it would be much more profitable to us than if we paid a greater price for it, of course.

A Grand Juror: 2 per cent, 1 per cent?

The Witness: I slaughtered quite a few light cattle, and the killing charge would amount to about three-quarters, between three-quarters and a cent a pound.

A Grand Juror: What per cent of that per pound?

The Witness: If an animal sold for \$100.00, it would be about 3 per cent; if your selling price would be \$100.00, your cost of operation would be about 3 per cent, attributable to that.

A Grand Juror: If you double the price, it would be 6 per cent?

The Witness: If you got \$200.00 out of the animal?

A Grand Juror: Two dollars for slaughtering instead of one.

The Witness: 2 per cent.

A Grand Juror: How far could that go before the thing went to losing money?

(Testimony of Samuel Ormont.)

The Witness: It is all subject to how cheap you buy animals, to start with. We are regulated in our buying of livestock, according to the maximum and minimum, and if we buy cattle at the minimum price, the cost against that would be very negligible, because we would take as high as \$15.00 on a beef on this basis, and on a \$3.00 charge we could make \$10.00 to \$12.00.

A Grand Juror: You said a while ago you could pay only up to a certain limitation before you started losing money. How would you know when that got to be too much if you got an invoice later for slaughtering in a certain amount, would you know you lost on that particular meat?

The Witness: Yes, on a particular load of cattle we know how much that animal cost us on the hoof, and take the killing charge out of that, we know immediately whether we are losing or making money.

A Grand Juror: How many times did you lose?

The Witness: I don't think I had an instance of once where I lost.

A Grand Juror: In other words, you came out with a profit?

The Witness: In my particular instance, I did the livestock purchasing myself; I had no outside buyers.

A Grand Juror: It so happened you bought them at a low price and got low slaughtering prices?

The Witness: I bought myself.

(Testimony of Samuel Ormont.)

A Grand Juror: You had no control over the killing, and you said you never questioned them. It would have to be bought low before you made money.

The Witness: As long as they were not excessive.

A Grand Juror: They would be fairly consistent, per head, you wouldn't figure at one time it would be twice that per head?

The Witness: I wouldn't figure anyone operating a business would jump me three or four times, but that the charges were constant.

A Grand Juror: They were pretty constant all the time you were there?

The Witness: Yes.

A Grand Juror: How many places did you slaughter in?

The Witnesses: No other places. I was in one plant 13 years, and I was ousted there because they wanted all facilities themselves, and I went into another plant and I was ousted there because they wanted all the killing facilities for themselves, and the last place, that was the last resort, and that is where I had to stick it out until I could find my own place.

Mr. Strong: That is all.

(Witness excused.)

I, O. Edgar Abbott, do hereby certify that I was the official reporter for the United States Grand Jury in and for the Southern District of California, Central Division, on October 10, 1945, that the foregoing transcript consisting of pages numbered 1 to 25, inclusive, is a full, true and correct transcript of the testimony of Samuel Ormont, given before the Grand Jury on October 10, 1945.

/s/ O. EDGAR ABBOTT,
Official Reporter.

[Endorsed]: Filed July 24, 1947.

In the United States District Court for the
Southern District of California, Central
Division.

No. 19138 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
Defendants.

REPORTER'S TRANSCRIPT OF
PARTIAL PROCEEDINGS

Appearances:

For the Plaintiff: James M. Carter, United
States Attorney, Los Angeles 12, California;
by William Strong, Assistant United States
Attorney, Los Angeles 12, California.

For the Defendant Ormont: Daly B. Robnett, Esq., and Benjamin Kosdon, Esq., 1007 Spring Arcade Bldg., Los Angeles, California.

For the Defendant Himmelfarb: William Katz, Esq., 415 Chester Williams Building, Los Angeles 13, California.

Los Angeles, California, May 21, 1947

10 o'Clock A.M.

The Court: Any ex parte?

The Clerk: I believe not, your Honor.

The Court: Call the calendar.

The Clerk: No. 19094, United States v. Sam Ormont and Phillip Himmelfarb, doing business as Acme Meat Company. Further hearing on application for filing in Emergency Court of Appeals.

Mr. Strong: Not ready on that for the government.

The Court: I will continue that until 10:00 o'clock tomorrow morning.

The Clerk: No. 19138, United States v. Sam Ormont and Phillip Himmelfarb.

Mr. Strong: Ready for the government.

Mr. Robnett: If your Honor please, as to the defendant Sam Ormont, I wish to state to your Honor that neither the indictment nor the bill of particulars which were furnished disclose the basis of the figures or items which the government claims are omitted from the income which were not accounted for, and does not show what items they are nor from whence they come, consequently it has

been impossible for us to prepare for a defense without knowing those items, and therefore we are in the dark as to those and are not absolutely ready for trial on that account.

The Court: Your motion is for a continuance?

Mr. Robnett: Yes, your Honor. I believe it would be in order, a continuance with a condition that they furnish us the information that is now requested, the basis of those figures and where they got them, so that we will know how to defend against them.

The Court: As I indicated yesterday, your demand for a bill of particulars was passed upon by another judge of this court.

Mr. Robnett: That is correct, your Honor.

The Court: The order which he made allowing a bill of particulars, those particulars have been furnished. I regard that as the law of the case and will therefore deny your motion for continuance.

The defendants are present in person?

Mr. Robnett: Yes.

Mr. Katz: Yes, your Honor.

The Court: The appearances for the government are William Strong?

Mr. Strong: That is all, your Honor.

The Court: The appearances for the defendant are Mr. Robnett——

Mr. Robnett: Mr. Kosdon for Mr. Ormont only.

The Court: Mr. Benjamin Kosdon for the defendant Ormont?

Mr. Robnett: Just for Mr. Ormont. There has been a substitution as to Mr. Himmelfarb. I believe it has been filed.

The Court: You are appearing for both defendants?

Mr. Robnett: No, your Honor, just for Mr. Ormont.

The Court: You are appearing for Mr. Ormont also?

Mr. Robnett: Yes, your Honor.

The Court: The appearance for Mr. Himmelfarb is?

Mr. Katz. Mr. Katz.

The Court: William Katz?

Mr. Katz: Yes, your Honor.

The Court: Was the motion for a continuance made on behalf of all defendants, Mr. Katz?

Mr. Katz: If the Court please, we will adopt the motion, the request made by Mr. Robnett on behalf of Mr. Ormont, as a request on behalf of the defendant Himmelfarb without remaking it or restating it.

The Court: In view of the fact that there are two defendants and each have separate counsel, may it be agreeable that any motions or objections or stipulations made by either defendant may be made on behalf of both defendants unless they are specifically disclaimed?

Mr. Katz: Yes, that is satisfactory.

Mr. Robnett: That is satisfactory.

The Court: Is it so stipulated?

Mr. Katz: So stipulated.

Mr. Robnett: So stipulated.

Mr. Strong: So stipulated.

The Court: Very well.

Mr. Robnett: Will that be considered as being separately made by each one?

The Court: That will be considered as being separately made and by each one as thought separately stated.

Mr. Robnett: Thank you.

The Court: Unless it appears obvious from the statement or objection that it applies only to one person, but such general motions or objections that are made throughout the trial will apply to both.

If it is your intention to object on the ground that the indictment does not state an offense, I might suggest, if agreeable to you, that you may make record at this time rather than before the impanelment of the jury.

Mr. Strong: That has already been taken care of by another judge.

The Court: To preserve their record they must make it again.

Mr. Robnett: As to count 2, on behalf of Mr. Ormont we do contend that it does not state an offense. That refers to the alleged income of Mr. Himmelfarb only.

The Court: Very well. Now what I had in mind was whether or not you anticipated making an objection on the same grounds that you made your motion for a continuance, that the indictment does not state an offense together with the bill of particulars furnished.

Mr. Robnett: I do make that as to each and every count, that it does not, even connected with the bill of particulars, it still is insufficient to state

the particulars which my motion for a bill of particulars specifies, or any of the counts, to state an offense against my client.

The Court: That is made on behalf of both defendants?

Mr. Katz: If the Court please, I intend to more specifically make that motion, if I may. I had waited with the thought in mind that that motion is more——

The Court: You need not do it now.

Mr. Katz: If it is agreeable to your Honor I would just as soon.

My thought was that it comes more properly at the time of the evidence is offered. I was waiting for that time.

The Court: We will wait until that time.

Mr. Katz: If your Honor will hear it now, we will make it. Whichever is your pleasure.

The Court: All right. The motion I suppose should be made in the absence of the jury, whatever motion you have to make in connection with that, and we have the panel here, and it might lend itself to more orderly procedure in the event we proceeded to impanel the jury first.

The clerk will fill the box.

(At this point a jury of 12 and one alternate were duly impaneled and sworn.)

The Court: Very well. I see it is now 12:00 o'clock. How long will you be in your opening statement, Mr. Strong?

Mr. Strong: Not more than 10 minutes.

The Court: Do you want to make that before recess?

Mr. Strong: May I do it after recess?

The Court: I will not be able to proceed immediately at 2:00 o'clock because I have some other matters set.

Mr. Katz: If your Honor please, I believe there are some motions that your Honor may want to hear in advance of the time the jury is to try this issue.

The Court: We will recess until 2:00 o'clock, and the jury is admonished not to discuss this case among yourselves or with any other person, nor to form or express a conclusion concerning it until it is finally submitted to you for decision. You will retire now. The bailiff will show you where the jury room is. You will return to the jury room at 2:00 o'clock and await the call down here. We may be a little delayed because I have some other matters on the calendar, so if you will just wait until you are called.

Recess until 2:00 o'clock.

Mr. Strong: Will your Honor instruct the witnesses to return?

The Court: Yes. All persons who are here as witnesses, whether subpoenaed or whether here voluntarily, whether here for the Government or for the defendants, are now ordered and directed to return to this courtroom at 2:00 o'clock.

The remaining jurors are excused until notified.

(Whereupon, at 12 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same date.)

Los Angeles, California, May 21, 1947

2:00 o'clock P. M.

(Interruption for other court matters.)

The Court: In the Ormont and Himmelfarb matter, I see now that it is practically 10 minutes after 3:00, and I doubt if we could get much more than a half hour's work in today. There is no use keeping you around here, and if agreeable I will continue that until 10:00 o'clock tomorrow morning, directing the defendants to return at that time and all persons who are here as witnesses, whether under subpoena or otherwise, or whether for the defendants or for the Government, are likewise ordered and directed to return at 10:00 o'clock tomorrow morning.

May it be stipulated that the bailiff may excuse the jury until 10:00 o'clock tomorrow morning without bringing them down to court?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Robnett: So stipulated.

Mr. Strong: May I ask that the Government's witnesses remain with me for a few minutes outside?

The Court: Mr. Strong asks that the Government's witnesses consult him before leaving the building.

Los Angeles, California, May 22, 1947

10:00 o'Clock A. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

The Court: United States v. Ormont and Himmelfarb.

Mr. Strong: Ready.

Mr. Katz: Ready.

Mr. Robnett: Ready.

The Court: The defendants are present?

Mr. Robnett: We have some motions to make.

The Court: Yes.

Mr. Strong: Your Honor, before they start the motions, may I say this. In the other case your Honor has given me until tomorrow morning. Now I have received a teletype from Washington, D. C., which indicates that there is absolutely no legal basis for this motion. We are getting together memorandum to present to your Honor in brief form to show exactly where in the statute there is no basis for going to the Emergency Court of Appeals because the Secretary of Agriculture didn't have to approve anything with reference to cattle until June 30, 1945. Then we will show your Honor that from that time on he did everything that was necessary. We will show your Honor that that amendment dealt specifically with cattle and that there are decisions which will point out to your Honor—I would like to have a little more time than Friday because I just can't do it. If you would give me until Monday we can get it out.

The Court: Very well. The other matter can go over until Monday at 10:00 o'clock.

On the other section of the motion, I have read the testimony of Sam Ormont. I think that should be transcribed. I do not wish to disclose the rest of of the proceedings—it should be transcribed and a copy of that given to the defendants—because there are some questions in there specifically concerning invoices. I will return this to you, and can you have your office transcribe it?

Mr. Strong: I don't know whether we can have our office, but we can have the reporter prepare a copy at counsel's expense.

The Court: Do you wish it?

Mr. Robnett: We would like to have one.

Mr. Strong: I will have that prepared by the reporter then.

The Court: Very well. Mr. Katz?

Mr. Katz: If the Court please, this is a motion on behalf of the defendant Himmelfarb to dismiss the indictment as against him and also to exclude, and an objection to the introduction of any evidence under that indictment as against him.

I make those two motions together because the facts and the law applicable are applicable to both of the motions.

If the Court please, as to Counts 3 and 4 we don't concern ourselves with those counts because they are not directed as against the defendant Phillip Himmelfarb. He is only concerned with Count 1 and Count 2. As to Count 1 he is mentioned in that count—he doesn't know and I don't know and we haven't

any way to tell—how or in what manner he is concerned with that Count 1 because the count is one that is directed as to a return filed and a tax alleged to be due and owing by the defendant Sam Ormont.

In that count it is alleged that Sam Ormont and the defendant Himmelfarb willfully attempted to defeat a large part of the income tax due and owing by Sam Ormont to the United States for the calendar year of 1944 by preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District, and so forth, a false and fraudulent income and victory tax return.

Now if the Court please there is nothing in Count 1 of the indictment, and there has been nothing added by way of aider by reason of the bill of particulars that has been furnished by the United States Attorney, which bill of particulars is a very meager one and doesn't actually go beyond, substantially beyond, the indictment itself in so far as furnishing any information. There is nothing from that Count 1 by which the defendant Phillip Himmelfarb can in any way determine how he was supposed to have attempted to defeat and evade any part of the income tax of the defendant Sam Ormont that he owed by reason of the filing of a return by that defendant Sam Ormont, or any tax that may have been due or owing by him. This isn't a situation where the defendant Sam Ormont is an accountant, a bookkeeper, an attorney, or in any capacity——

The Court: Ormont?

Mr. Katz: Pardon me, the defendant Himmelfarb—in which he would be acting in the preparation of income tax reports or income tax returns for and on behalf of any other person.

I believe in an indictment of this type and kind it is necessary that it appear from the indictment how or in what manner the defendant Phillip Himmelfarb is connected with a tax return filed by some other person or income tax that is due and owing by some other person. That does not appear at all from Count 1.

And of course where a reference is made to an income tax return filed by a person other than the defendant, an income tax due and owing thereon, the matters of gross income, net income, deductions, all of those things are not within the knowledge of the defendant whose income tax return it is not.

I can understand that there is and might be a basis in some case for stating that some of the information is within the knowledge of the defendant, but that can only be true in those cases in which the report or the return is that filed by or on behalf of the defendant accused. But with respect to Count 1 that is not the situation. The defendant Phillip Himmelfarb cannot, in the absence of any actual showing to the contrary, have or be presumed to have knowledge of the gross income or net income or deductions or any other facts relative to the filing of the income tax return by the defendant Ormont, nor is he in a position to know and can he come into this court and adequately or at all prepare a defense to an indictment and to a count in an indictment which charges that he with

somebody else prepared a return of the other defendant without indicating what it is that the Government is relying upon that connects him, that he is supposed to have done in the way of preparing or causing to be prepared, filing or causing to be filed.

The Court: Was this point raised before?

Mr. Strong: Yes, your Honor.

The Court: And argued?

Mr. Katz: If the Court please, the point as I have stated it——

The Court: You may raise it again at any time, you understand.

Mr. Katz: I understand that, but I wanted to make this clear to the court: I came into this case five days ago—it might be six; I think it is about five—and was not in the case representing the defendant Phillip Himmelfarb or in any way connected with the case until then. I am not in a position to make any statements to your Honor as to what was actually argued before any other court previous to this time.

The Court: As you have stated your position, it seems to me that it becomes a question as to whether Section 145 of the Internal Revenue Code modifies Section 550 of Title 18. The defendant Himmelfarb is charged here as a principal. Under Section 550 of Title 18 it is provided that “whoever directly commits any act constituting an offense defined as any law in the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal.”

So that the procedure which was followed is to charge all persons not simply as aiders and abettors, as used to be done—and I don't know whether it is still done in the state court or not—but to charge them directly as principals.

This indictment, however, states it is brought under Section 145 (b) of the Internal Revenue Code. Under the new criminal rules I think it is a requirement, while the law has been and I doubt if the substantive law has been changed in that respect, that the law alleged to be violated, that is, the section of the code, if it states an offense under any other section of the law it nevertheless is good.

But this indictment is returned under Section 145, which says that "any person required under this chapter to pay a tax * * * shall be guilty" in (a) and in (b) and in (c) it defines a person. "The term person as used in this section includes an officer or employee of a corporation or a member or employee of a partnership who as such officer, employee or member is under a duty to perform the act in respect to which the violation occurs."

Now it does not appear in the case of the indictment, if the defendant Himmelfarb was an officer or employee of the corporation or a member or employee of a partnership, or that he was as such employee or member under a duty to perform the act in respect to which the violation occurs. Now it seems to me that the question posed is whether or not that provision modifies Section 550 of the criminal code on the one hand, or if that is not a fact, in other words, it doesn't appear that there

is any corporation or partnership involved in this matter, or if that is not a fact, if it states an offense just as it is drawn. In other words, he might have aided and abetted or counseled or commanded the defendant Sam Ormont in any particular and he would still be a principal.

Mr. Katz: Yes, if the Court please, he might well be a principal if the indictment so alleged him to be. But where we have a situation in an indictment in a count such as this where we make reference specifically to a tax return filed by someone other than the defendant who was charged, in this case a tax return of someone other than the defendant Himmelfarb, and there is nothing within the terms of that that indicates how or in what manner or by what means the defendant Himmelfarb is in any way connected with a tax return of the defendant Ormont, or was required by any position he occupied or by anything that he undertook to do, to file a return or participate or to make the return or prepare it or cause it to be prepared, that we don't have facts that bring him within a relationship or in the position of a principal defendant.

I can understand that where we have an offense that may be committed by one or more persons they can all be charged as principals, but I don't believe that that is true with respect to a matter of this kind where you refer specifically to a tax return that an individual must prepare or file or have prepared or filed for him, that someone else, some stranger, unless he is connected up and shown to have some direct connection with that return, can be charged merely as a principal.

I don't believe that if in Count 1, if the Court please, if the defendant Sam Ormont's name was eliminated and the charge was merely that Phillip Himmelfarb attempted to do these things as charged, without any showing as to what the connection is on the part of the defendant Himmelfarb, or any legal requirement or legal duty or other requirement or duty on his part indicating any relationship, that it would state an offense.

The Court: I do not know. I think that was all raised by the motion to dismiss which was heretofore filed on behalf of the defendant Himmelfarb.

Mr. Strong: That is our position, your Honor, that it was all raised by that motion. It goes into detail for 19 pages, as to why these counts are no good.

The Court: Yes. I think it raises the same general proposition, and in view of the fact that that was denied by another judge of this court, I don't know which one, I think it becomes the law of the case and I am bound to follow it.

On the merits, however, were I to rule on it I would have to rule against you on the grounds that you have stated, and your objection to the introduction of that evidence.

Mr. Katz: If the Court please, with reference to both counts, both 1 and 2, I do want to call your attention to this fact, and preliminarily permit me to say that I understand that prior rulings of a court are the law of the case that are binding except such motions that may be made at any time from time to time and every time that they are

made that the court before whom it is made, such as a motion to dismiss, is one of those things that any ruling that has previously been made is not binding upon this court. If I thought that it had been I wouldn't make a motion and ask this Court to pass upon anything that was previously passed upon.

The Court: I think that you are bound to make your motion and preserve your record and you are bound to make it at every stage of the proceedings at which you can make it.

Mr. Katz: That is right, your Honor, and it is my thought though that the requirement that we make that motion is because the court before whom it is made at each stage has a right to determine it as that court views it.

So I make the motion, and I want to say this, that with reference with count 1 and 2 both, that both of those counts make the allegation with respect to the tax that is due and owing thereon in the past tense. In other words, the charging part of the indictment is "Upon said net income"—and I am reading now from count 2 and just by way of illustration—"upon which said net income he owed to the United States of America an income tax of \$5,843.91." It isn't that he owes it, it isn't alleged that he owes it, it isn't that it is due; it is alleged that he owed it, and they refer to a calendar year 1944.

Now it might be, and I believe that the cases support the proposition, that in a prosecution for attempting to evade income tax, in addition to show-

ing that there has actually been a willful attempt to evade it, it is incumbent that there be proved that there is a tax actually due and owing in a substantial amount—it can't be insignificant, in a substantial amount—over and above the amount that was paid.

The Court: Due and owing at the time the indictment was returned. If that were the case you would seldom have any income tax prosecutions because when the grand jury begins to breath on somebody's neck they usually come in and pay.

Mr. Katz: That may be, except this: this is the peculiar state of the situation that you have, if the Court please. It is alleged in both of these counts that the defendants owed for the year 1944, the amount owed in a tax over and above that which was reported and paid.

The Court: Excuse me just a moment. Go ahead.

Mr. Katz: Yes, your Honor.

The Court: I missed your last statement.

Mr. Katz: The statement is, in both counts 1 and 2 it is alleged that the money was owed for a calendar year 1944. Now we do have situations, and I think it will develop in this case, if the Court please, individuals may be on a calendar basis and they may be interested in partnerships or joint ventures which are on fiscal basis. On a calendar basis they report their income for the calendar year. On the fiscal basis they report their income from a partnership or joint venture the calendar year in which they receive that income which, under the law, is received in the calendar year in which the fiscal

year for the partnership or joint venture ends. So that in a situation such as we have here, where an allegation is made that there was a tax due and owing for 1944, and actually the taxpayer is in a position where he is interested in a partnership or joint venture, the fiscal period for which commences some time in 1944 and ends some time in 1945, and consequently under the law—and I don't believe there is any question about my understanding of it; at least the correctness of the rule as I understand it—that income is reportable irrespective of when it is actually received as of the end of the fiscal year when it is distributable and deemed distributable, even though it is not actually received by the taxpayer. Consequently that will be reported in the year 1945.

The Court: In which event the allegation would be that he owed the tax at whatever date the end of that fiscal year required instead of that he owed the tax.

Mr. Katz: The point I am trying to make, if the Court please, that if in the year 1945 a return is made based upon the understanding, whether correct or incorrect, that the fiscal year of the partnership being the year during which it is reported so that the income for 1944, the portion of 1944 and 1945 in that partnership from that joint venture is reported in 1945, we then have a situation where the taxpayer has actually paid all of the tax due and owing by him for the years 1944 and 1945.

Now it may well be that the government takes the position that the part received in 1944 should

have been paid in 1944; the part received in 1945 should have been paid in 1945, instead of it being treated as it was, as we think properly, a return for the entire period based upon that fiscal year.

But nevertheless we are entitled to know—and the facts that I state to the Court are stated to illustrate the position that we are in—we are entitled to know before we come in here to prepare our defense whether or not the government takes the position that there is tax due and owing over and above what actually has been paid, or whether they are taking the position that all the tax required to be paid has been paid. As a matter of fact, it may be that the facts will show, and I think they will, that there is an overpayment, but that it wasn't paid within the period that they believe under the law was required to be paid, although it was paid by the defendant Phillip Himmelfarb within a fiscal period in which he believed that it was reportable, returnable and paid.

The Court: I think that is a matter of defense. I think so far as the indictment is concerned, the allegation that upon which said net income he owed to the United States and the date is fixed previously—well, the date is not fixed there so it doesn't make any difference whether it is a fiscal year or calendar year—they just allege here that he committed fraud.

Mr. Strong: We have the date at the onset of the count.

The Court: On or about the 15th of March.

Mr. Strong: Yes.

The Court: And on that date they owed it. And if, for instance, the government were contending that it was a fiscal return ending at the end of May or the end of June, as many of them do, or the end of July, they would allege that on or about such and such a date, that is, the 30th of June or the 15th of July, whatever the date was. I think the indictment is sufficient in that respect. That, however, is a matter of defense. It may become apparent from the evidence of the case as it unfolds that that was the intention and understanding, in which event why a motion for a judgment of acquittal at the end of the case would permit the Court to take that into consideration.

Mr. Katz: It is quite obvious, I believe though, that from the nature of the allegations of counts 1 and 2 of the indictment, together with the bill of particulars, that a defendant is not advised and is not in a position to know what of many, many possible claims he may be called upon to defend against. That is one of the points I make, but that is one of the things that your Honor has said that has been ruled upon and your Honor isn't going to apparently change that. I do, however, make that motion.

Now I wish to make one other motion, if the Court please, and that is a motion to withdraw a juror and to declare a mistrial, and it is based upon this fact: Your Honor will recall that yesterday during the impanelment of the jury that Mr. Strong voluntarily and gratuitously made a reference to a pending OPA case. Your Honor, before

objection could be made, immediately instructed the panel that was being examined for purposes of selection and impanelment of the jury, that that had nothing to do with it, instructed them to disregard it, and made a full and fair instruction upon that point. That was done, as I say, if the Court please, without even the opportunity or necessity for any objection or protest on the part of counsel. Because your Honor did so immediately and quickly make that instruction, there wasn't anything to be gained at that point, if the Court please, other than to further increased the prejudice by making the objection which would have resulted in the instruction that your Honor previously had made, and a motion couldn't have possibly have been made to withdraw a juror and declare a mistrial because the jurors had then not been impaneled. I believe that any such motion as I now make in the absence of the jury, had it been made in the presence of the jury, would have tended only to emphasize and increase the prejudice resulting to the defendants.

Now I am familiar with the fact, your Honor, that in these types and kinds of cases where, of necessity, other offenses must be shown in order to prove the offense with which the defendant is charged, that such other offenses may be shown.

The Court: Similar offenses.

Mr. Katz: Similar offenses.

The Court: They must be similar.

Mr. Katz: Yes, your Honor. But those are not matters that can be gone into, in so far as the evidence necessarily brings that to light. That isn't the situation here, and even where such separate offenses may be shown, reference may not be made to any pending action or actions of a criminal nature against the defendants. Now that was done.

The Court: I think that is the rule. There isn't any doubt about it at all. I thought that I had cured the possible prejudice yesterday but I am not sure about it. It is a very rigorous and stringent rule and requires absolute obedience to avoid any prejudice.

Mr. Strong: Your Honor, I would have no objection to the calling of another panel. I don't want to injure the defendants by a statement which I didn't realize was improper when I made it. I will agree, if your Honor sees fit, to call another panel of jurors.

The Court: We can't get one this morning. Is there a panel around the court rooms?

The Clerk: I do not believe so.

The Court: Do you think we can get one by 2:00 o'clock?

The Clerk: No, your Honor.

The Court: I do not want to delay the trial, but I think you are right, counsel, on the matter of the possible prejudice here. The law is so strict and stringent in that regard, I mean only in cases wherein willfullness or a specific intent is an element of the crime is there permission then, and it is a restricted and limited one, to show similar prior offenses, but they must be completed offenses.

Mr. Strong: I may point out for your Honor's information that almost as soon as this case opens we intend to show that the money was received from OPA over-ceiling sales. That was the source of the funds in this case.

The Court: Is it your intention to show that they were over-ceiling sales or that they were just a source of money?

Mr. Strong: Side money payments in addition to the ceiling amount. But I said I would agree to another jury. I don't want to leave anything which might constitute an improper selection or reversible error after the case is finished. I would rather get it done with right now.

The Court: I will grant the motion to withdraw the jury and declare a mistrial, and continue the matter until 2:00 o'clock. I will hold that order a moment and see if there is a jury around some place. Can you conduct an exploratory expedition, Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: May it be stipulated that the jury may be excused without being brought back to court?

Mr. Strong: So stipulated.

Mr. Katz: Yes, your Honor.

Mr. Robnett: We so stipulate.

The Court: Advise the jury, Mr. Bailiff, that they are excused until notified; that they are permanently excused from this case and excused until notified, and do not advise them any further.

Mr. Strong: May I ask this, your Honor: There are some witnesses here who are businessmen and

they are quite busy. I don't believe we will have a jury selected and start with the trial actually beyond possibly the first witness until tomorrow morning. Would it not be possible to have them all excused until tomorrow so that they can get back to their respective businesses?

The Court: The Clerk says that it is difficult to get the jurors by telephone and get them here by 2:00 o'clock. I think that in the long run time will be saved—I am sorry about it; I know that a lot of witnesses are here and the lawyers and everybody—the order will be then to continue all proceedings in these matters until tomorrow morning at 9:30 o'clock.

(Whereupon, at 10:55 o'clock a. m., an adjournment was taken until 9:30 o'clock a. m., May 23, 1947.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of June, A. D., 1947.

Official Reporter.

[Endorsed] Filed June 23, 1947.

In the District Court of the United States in and
for the Southern District of California, Central
Division.

Honorable Peirson M. Hall

Judge Presiding

No. 19094 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
doing business as ACME MEAT COMPANY,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff: James M. Carter, United
States Attorney, Los Angeles 12, California; by
Alfred P. Chamie, Assistant United States Attor-
ney, Los Angeles 12, California.

For the Defendants: Daly B. Robnett, Esq., and
Benjamin F. Kosdon, Esq., 1007 Spring Arcade
Building, 541 South Spring Street, Los Angeles 13,
California.

Los Angeles, California, May 19, 1947

10 o'Clock A.M.

The Clerk: Your Honor, we have the matter of
United States vs. Sam Ormont and Phillip Him-
melfarb, doing business as Acme Meat Company,

motion for immunity and for order barring prosecution of defendant Sam Ormont and notice of an application by defendant Sam Ormont, and Sam Ormont doing business as Acme Meat Company, for leave of Court to file a complaint in action in the United States Emergency Court of Appeals against Phillip Fleming, Temporary Controls Administrator.

Mr. Chamie: Your Honor, Mr. Strong who is representing the Government is up in San Francisco before the Circuit Court of Appeals, and he asked me to inform the Court that he would be ready and available for the trial of the criminal matter which is set for the 21st of May.

The Court: There are two criminal matters. Is this the matter which is going to trial?

Mr. Chamie: The income tax case is the one that is going to trial.

The Court: This is a conspiracy and an Emergency Price Control case?

Mr. Chamie: The information I have is with relation to the income tax trial on the 21st.

The Court: There are two cases, are there not?

Mr. Robnett: There are two cases, your Honor, and this is on the Emergency Price Control Act which is to follow the other case. The other case is set for the 21st. This has really nothing to do with the other case.

The Court: Are you familiar with this is at all?

Mr. Chamie: Not at all.

The Court: Mr. Strong is?

Mr. Chamie: Yes.

The Court: Will he be ready to go to trial on the 21st, on Wednesday?

Mr. Chamie: He will be, your Honor.

The Court: When the matter was assigned to me by Judge Weinberger, I understood these motions—there were some motions in this and are there some motions in the Internal Revenue case too?

Mr. Robnett: There is none in that, your Honor.

The Court: That there were some motions set for today before Judge Weinberger and I made the suggestion, either to him or to Mr. Strong, that they be put over until tomorrow, in view of the fact that the income tax case is going to be tried first and that both cases are against the same defendants. Is that correct?

Mr. Robnett: That is correct.

Mr. Chamie: Yes.

The Court: I think I might defer any consideration of this until the conclusion of the Internal Revenue case.

Mr. Robnett: There is only one thing, your Honor, in one of these cases there is a motion for leave to bring suit against the present occupant of the position which we have to bring our suit before the Emergency Court of Appeals, Mr. Fleming. Our information is that we would need to file that suit before the 1st of June, if filed against him. Of course there might be a successor, but in any event that was our information, that the suit if it was filed before the 1st of June would be against that party and our motion is for that.

Now that would seriously affect our preparation in that case which follows this. We would not have much time to prepare, in fact we don't have any in between time after we try the one case if the other is to follow. I would like very much if we could get this disposed of before the trial of either case.

The Court: Has the Government filed any answering brief or memorandum here?

Mr. Chamie: I am not in any position to answer.

The Clerk: I have not received anything.

Mr. Robnett: They have not, your Honor.

The Court: Mr. Strong will return tomorrow?

Mr. Chamie: He will, sir.

The Court: Would it be a matter of too great inconvenience to you, Mr. Robnett, to return tomorrow afternoon at 2:00 o'clock.

Mr. Robnett: No, your Honor. We are agreeable to accommodating counsel, naturally.

The Court: In the meantime I can examine the file and examine your motions. I notice that you refer to several price regulations.

Mr. Robnett: Yes, sir.

The Court: I do not have them available.

Mr. Robnett: I think we may have all of them, at least all the amendments.

(The documents referred to were passed to the Court.)

The Court: You have quoted the pertinent portions of the regulations in your memorandum, have you?

Mr. Robnett: No, your Honor. I have not quoted the regulations as to prices at all, only referred to the fact that none of these regulations, up to a certain one which was in 1945 were ever approved by the Secretary of Agriculture, and neither the original nor those amendments. That is all set forth in an affidavit and we have as a background for that wired and found out that that was true from the Department itself.

The Court: And the basis of your objection, briefly stated, is that this concerns an agricultural commodity, to-wit, meat, and that under the terms of the price control law any regulation had to be approved by the Secretary of Agriculture.

Mr. Robnett: That is correct.

The Court: Which was not done?

Mr. Robnett: Well, we don't go quite so far as saying just meat, your Honor, that we claim that it pertains to everything this defendant was engaged in handling.

The Court: What was he engaged in handling?

Mr. Robnett: Beef carcasses and veal carcasses. There is a little difference between whether it is meat that is cut and whether they are carcasses.

The Court: You mean meat ceases to be meat at a certain point and becomes a vegetable?

Mr. Robnett: No. It may cease under this act to become a commodity.

The Court: An agricultural commodity?

Mr. Robnett: A processed commodity after they have cut it up. It is still meat, and of course we

contend that it remains an agricultural commodity until it is at least cut up. That is what he was dealing with, was carcasses.

The Court: I do not know as that would appear from the face of the indictment.

Mr. Robnett: Yes, your Honor.

The Court: It describes the sale of meat.

Mr. Robnett: If you will note Counts 2, 3 and 4.

The Court: Well, it says agree to sell certain meat items described by them as "1 B Beef."

Mr. Robnett: A whole beef, that is.

The Court: It doesn't say it is a whole beef.

Mr. Robnett: "1 B Beef" would be B quality beef, I take it.

In any event, your Honor, that is what was handled and that is what will be developed in the case.

The unfortunate feature is that there is only one court which they have allowed to determine that fact, and that is the Emergency Court of Appeals, as to whether that is an agricultural commodity or whether the regulations were duly adopted and approved, so that we are asking there merely for the permission to bring that suit to test that, and of course incidentally for an abatement of this indictment until that is determined.

The Court: Now you said you had copies of the regulations available that you could leave with me here?

Mr. Robnett: I can leave with you 169. I will say this, your Honor, that although we cite the others because they are cited in the indictment, they pertain to a different class of slaughtering, to hogs

and such as that that we did no slaughtering of, and I am sure there will be no evidence in the case, although they are set forth in the indictment. I do not have those with me but I do have 169, which is the one that pertains to this.

The Court: Is that a copy you can leave with me?

Mr. Robnett: Yes. And it covers all amendments up to May 25, 1945. Here is one to December 1945.

In December 1945 they did start approving the amendments. I will leave this with you.

(The documents referred to were passed to the Court.)

Mr. Robnett: The other motion, of course, is the motion for immunity on the ground that the defendant was compelled to testify before the grand jury.

The Court: In this case?

Mr. Robnett: In this same case.

The Court: That is supported by an affidavit?

Mr. Robnett: Yes, it is, your Honor.

The Court: Of whom—oh, yes.

Mr. Robnett: Pardon me. In connection with this other motion, I have one here showing approval by the Secretary of Agriculture just to show you how they did approve after they started approving.

The Court: This one is 169, August 30, 1946.

Mr. Robnett: All I was doing, your Honor, was just showing that those approvals are always put on when they are granted and the others that I have shown you are not, and do not have that on it. I

don't know whether I make myself clear there or not. Of course we have an affidavit that states that they were not approved.

The Court: Ordinarily in these matters—I have had several of them—I have granted I think one or more but I did so after the trial because at that time there could be no question about the facts upon which the Government was asserting a violation.

Here I notice the first count is a conspiracy count and it merely alleges that they will sell meat at prices in excess of these regulations. It doesn't describe the kind or type of meat, and the rule of course is that in construing an indictment recourse cannot be had to the subsequent counts for an explanation of what is contained in the first count. The Government is the one who usually comes in and asserts that. So in looking at the face of this I would just say offhand that there would be nothing before me which would show any doubt as to the conspiracy count, but what the kind of violation aimed at is that prohibited by the prescribed regulations. Do I make myself clear?

Mr. Robnett: I appreciate that.

The Court: If, however, upon the trial of the case it develops that the basis of the conspiracy count is whole carcasses of beef which, as you claim under the law must be approved by the Secretary of Agriculture, then possibly a situation would arise where I could certify the matter to the Emergency Court of Appeals who would then have before them the record and the facts. Now I do not see how the Emergency Court of Appeals, in looking at this

indictment, unless there was a stipulation from the Government that it did cover only whole carcasses of beef rather than any other type or kind of meat or whole carcasses of beef, whatever it is, unless there is a stipulation it doesn't seem to me that the Emergency Court of Appeals would be able to determine whether or not your point was good or bad because they cannot tell from reading the conspiracy count that it means whole carcasses of beef.

Mr. Robnett: Well, your Honor, I don't think they can determine on the indictment here because that would not be before them but they could determine whether or not as it applied to the things we claim the act was valid or invalid.

The Court: Yes, the indictment would have to be before them, they would have to have some—that would be the basis of the certification then.

Mr. Robnett: It isn't really a certification, it is only a permission, as I understand it, under the act that we have to get in order to bring the suit. But it would at least apply to the three or four separate counts and if we went to trial they are all before the jury and we might be in a position that we would be seriously injured because we had not invoked the jurisdiction of the court in raising that point, and that would jeopardize us.

The Court: Tomorrow afternoon at 2:00 o'clock if you will return, perhaps in the meantime I will be able to get hold of Mr. Strong when he returns tomorrow morning and see whether or not he would make a stipulation concerning the basis of the charge in Count 1.

Mr. Robnett: Very well, your Honor. That will be 2:00 o'clock tomorrow afternoon?

The Court: I will continue this until 2:00 o'clock tomorrow.

Mr. Robnett: Thank you. That is as to both motions?

The Court: As to both motions.

Los Angeles, California, May 20, 1947

10:00 o'Clock A.M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

The Court: Very well. No. 19094, United States vs. Sam Ormont and Phillip Himmelfarb.

Mr. Robnett: Ready, your Honor.

The Court: Is Sam Ormont here?

The Defendant Ormont: Yes.

The Court: Phillip Himmelfarb?

The Defendant Himmelfarb: Yes.

Mr. Strong: I am here but I don't know whether I am ready. I would like to have the motion go on of course and if there is anything to be added, with your Honor's permission might I have, if you so desire additional matter, some time to get a memorandum up subsequently. But I have no writings of any kind in opposition because I haven't had time to prepare one. I do oppose the motions and possibly the argument will take care of everything necessary, but if not I will ask you Honor's indulgence to give me a little more time.

The Court: I have read the motion for immunity on behalf of Sam Ormont and it did not appear to me to be sufficient. There isn't anything that I can tell from what is before me now as to what questions he was asked or whether he was asked at all about the matter concerning which he was indicted. Was this the grand jury which indicted him?

Mr. Robnett: I understand so.

The Court: Or was it the previous grand jury?

Mr. Robnett: I understand it was the same grand jury. That is my understanding, your Honor.

The Court: Do you have the file here?

(The document referred to was passed to the Court.)

Mr. Strong: It was not the same grand jury and it is obvious that it could not be.

The Court: It does not appear to be. According to the affidavit he appeared in February 1946. That grand jury was discharged in September 1946 and the new grand jury impaneled in September, unless—can you state that it is not the same grand jury? Sometimes these grand juries are held over by a special order of the court.

Mr. Strong: They were two different grand juries, as far as I remember.

The Court: Then on the face of it your motion for immunity on that ground alone would have to be denied.

Mr. Robnett: Your Honor, may I make just one or two observations? I don't understand that ques-

tion of immunity would be whether it was the same grand jury or it was not the same grand jury; it would be based upon the proposition that when the Government called the defendant and compelled him to testify by subpoenaing him before the grand jury on a hearing and compelled him to give evidence in connection with the matters, the very matters which later he was indicted for, whether he was indicted on his testimony or not I don't think would make any difference. It would be a question that they had compelled him to give evidence on that subject matter and matters relating thereto and then afterwards indicting him. I think he is entitled to his immunity because he was compelled to give that evidence, not whether an indictment was based on that or not.

The Court: There is a possibility that that could be so but it doesn't appear from the files and records before me that it is so. In other words, it could be so if the testimony and evidence which he gave before a grand jury which died or expired by expiration of its term of office which was not used in any subsequent indictment, it would seem to me that he suffers no prejudice.

Mr. Robnett: Your Honor, I believe this is a fact—maybe counsel knows whether it is not not—but I believe that that grand jury before whom he was called and so testified, that they were examining and going into the investigation regarding alleged violations of the OPA—I will refer to it as that—violations which they claimed the Southern California Meat Company and its officials had com-

mitted in connection with this event. I believe that grand jury rendered an indictment against this Southern California Meat Company, or some of its officials, or both, and that they have plead guilty in that matter. That evidence of the defendant was taken into account undoubtedly in that case. Therefore he was giving evidence in connection with a matter which afterwards they have indicted him on.

And if you will notice in the first count in this case there are many charges there of his alleged violation in connection with the Southern California Meat Company. Many of the overt acts pertain to the Southern California Meat Company.

The Court: That would compel me to draw an inference which I do not think I would be warranted in drawing from the state of the record before me. Now I know it is the custom and practice ordinarily not to have a stenographic reporter in the grand jury.

Mr. Robnett: Yes, I understand they did not have one.

The Court: And if they did not have one we do not have the benefit of a stenographic transcript of what questions were asked him.

Mr. Strong: That is wrong, your Honor. There was a reporter present.

The Court: In the grand jury?

Mr. Strong: There is not always, but in this case there was. A reporter was sworn in and he took stenographic notes.

The Court: In this case of Mr. Ormont's testimony?

Mr. Strong: Yes. But I don't think that we should be required to produce grand jury testimony unless they make a showing under oath.

I can state to your Honor that Mr. Ormont said nothing which tends to incriminate him, absolutely nothing, and therefore he has no immunity of any kind. He wasn't being investigated and it has nothing to do with him.

The Court: I appreciate the assurances of counsel, but as a judge, that is a conclusion that I must reach.

Mr. Strong: I have the transcript of the testimony of Sam Ormont, every question and every answer.

The Court: There would have to be that transcript of testimony, but even so I don't know that the grand jury, not having indicted him, I think if you have that transcript that the defendant is entitled to have it for purposes of his motion and submit the matter on that.

Mr. Robnett: Yes, your Honor. I did not know that they even had a reporter.

The Court: Do you have it?

Mr. Strong: No, I don't have it with me.

There is another question, unless your Honor orders me to give a copy to the defendant, I can't supply a copy. I only have the one copy. I can supply it to your Honor.

The Court: I understand under the new rules it can be furnished upon the order of the judge.

Mr. Strong: Yes. I just have the one copy and we don't really have facilities for making copies.

The Court: If you can submit that copy to me, I will let the motion stand submitted upon that, the motion for immunity.

Mr. Strong: Yes.

Mr. Robnett: Thank you. But I would like to also call your Honor's attention to the Armour case recently decided, and which I have cited, that in that case it was shown specifically that the defendants did not give any incriminating testimony, they gave testimony the other way, they denied any and all violations, nevertheless the Court there held they were entitled to immunity, that it didn't make any difference what their answers were, whether they incriminated them or didn't, the fact that the Government sought to inquire of them and that their answers might incriminate them seemed to be sufficient cause.

I just cite that to your Honor.

The Court: That is cited in your memorandum?

Mr. Robnett: Yes.

Mr. Strong: We will submit a memorandum, your Honor, of case to the contrary.

The Court: I do not remember the case, but I remember the old rule which I ran into as a district attorney myself—of course I never had this situation arise because where there was any possibility of a defendant being indicted I always had him sign a waiver of immunity.

Mr. Strong: They wouldn't do it.

The Court: Otherwise the rule is generally that the man must claim his rights at the time, and I think it even goes so far in some cases that he must claim it as to each question.

Mr. Robnett: There are many acts that do require that he must claim it, and in the Armour case they did claim it, I will say that. They had counsel and they did claim it.

There are cases though that intimate to the contrary, where the defendant, as in the case of this instance, was not familiar with the law, did not know his rights, thought he had to obey the subpoena and give testimony and had no legal advice on the subject. I have quoted from one case where they say, "Many know their rights and many do not." The Armour case is cited on the last page of my authorities, your Honor. It is in 64 F. Supp. 855.

That case came up directly on that proposition, but their evidence, as I say——

The Court: Do you make nay point of the subpoena issued to him by the OPA?

Mr. Robnett: Yes, your Honor, I make a point on that as well as the one before the grand jury there he furnished books and records under subpoena.

The Court: To the OPA?

Mr. Robnett: To the OPA; yes.

Mr. Strong: But not to me.

The Court: Well, the act specifically provides for immunity there.

Mr. Strong: I don't know what books he furnished. I have never seen them nor do I know what they are.

The Court: That does not make any difference. What page is that in your memorandum?

Mr. Robnett: That is at the foot of the third page and then on over to the fourth page. That was a subpoena duces tecum, and we have set it forth in which they required him to submit those different books, general ledger, journal, invoices of sales, subsidy applications, reports, sales register, cash register, bank records, and so forth.

Mr. Strong: I just want to point out to your Honor that records kept pursuant to the Emergency Price Control Act have been held time and again to be quasi-public records and there is no privilege attaching to them. The section deals with testifying, as I recall it, before one of the administrative officers, and there is also a necessity, I believe, for claiming immunity. Simple production of records which are quasi-public records provide no immunity whatsoever.

The Court: That seemed to be the notion as to what the Glick case held, but the Circuit Court of Appeals of the Ninth Circuit recently modified the Glick case in the Freeman case. The distinction which they made in the Freeman case, if that is the name of it, was that in the Glick case he voluntarily surrendered his records without subpoena and therefore he could claim no immunity.

Mr. Strong: But the entire law dealing with quasi-public records would have no effect if they were in each instance held to be public property because they were voluntarily surrendered, because even personal records, private papers, which are voluntarily surrendered do not give the voluntary surrender any immunity.

The Court: That is correct, but the point is that he did not voluntarily surrender his records, that whatever the defendant in this case appeared with he appeared with under compulsion of a subpoena which said at the end, in capital letters and black ink, as I remember, "Fail not at your peril."

The case of *Freeman vs. United States*, 160 F (2d) 72 distinguishes the *Glick* case and held that the records, while quasi-public, may be had only by consent for the purposes of a criminal prosecution.

Mr. Strong: I assume I have permission to submit a memorandum within a short time?

The Court: You mean by 3:00 o'clock?

Mr. Strong: Commensurate with the disability of our secretarial services; say by next Monday.

The Court: On the matter of immunity, do you recall that section in the act?

Mr. Robnett: No, I do not.

Mr. Strong: I have the act here:

"No person shall be excused from complying with any orders under this section because of its privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 1, 1893, United States Code 49, Section 46, shall apply with respect to any individual who specifically claims such privilege."

And that of course is the Federal Communications or Federal Trade Compulsory Testimony Act, I believe.

The Court: What section is that?

Mr. Strong: That is Section 922 (g). It is on page 361 of the United States Code Appendage.

The Court: What is the immunity statute they refer to?

Mr. Strong: That is in 49 U. S. C., Section 46.

The Court: This act will apply with respect to any individual who specifically claims such privilege, and there is no showing here that he did claim the privilege.

Mr. Robnett: No, your Honor, we have not made that showing. We made the showing that he didn't know his right to claim it.

The Court: Sometimes it seems like kind of a harsh rule, but it is the rule that that is lost because he did not claim it. He is presumed to know the law.

On the matter of the motion for immunity, that will be submitted upon the receipt of the transcript, if you can send it down this afternoon.

Mr. Strong: This afternoon?

The Court: Yes, just the transcript.

Mr. Strong: It comes together with a lot of other testimony. If your Honor is going to read it alone I will leave it together but if your Honor intends to give a copy to the defendant——

The Court: No, I will just read it myself.

Mr. Strong: Yes, sir.

The Court: On the other motion, that is, your motion for leave to file a suit in the Emergency Court of Appeals, I again looked at the indictment and read your brief and your memorandum, but the difficulty, as I pointed out the other day, I have to

judge what the facts are by what the indictment says they are. Now while it may be true about your grades of beef as to the separate counts, the first count says nothing about it, and there is nothing from which I can say that the meat which is described there, and it is only meat, is meat which it is, sides of beef——

Mr. Robnett: Sides and carcasses.

The Court: Now if the United States Attorney is willing to stipulate that the sales of meat described in the first count consisted only of sales of sides and carcasses of beef, or whatever it is——

Mr. Robnett: Beef and veal.

The Court: ——beef and veal, then I would have the question properly before me, and in a way upon which I could make a decision upon your motion. But as it is now, I do not.

Are you willing to make that stipulation?

Mr. Strong: I can't at this point, because as a matter of fact I don't know myself. But beyond that, I wasn't here yesterday, your Honor, and I don't know what difference it makes whether it is or it isn't. This man describes himself as a slaughterer in his sworn motion before the Court, but he also has filed a sworn income tax return.

The Court: I haven't got it.

Mr. Strong: But he knows the facts.

The Court: I know, but it isn't what he knows, it is what I know.

Mr. Strong: If there is that point, and if there is any further question arising, I would like some time to set this forth in my reply.

The Court: His point is, as he makes it here in the memorandum—I don't know whether you have had time to examine it or not—his point is that type of commodity in which he was engaged in selling was the type of commodity which arbitrarily, for the purposes of the Emergency Price Control Act, was described as an agricultural commodity requiring the approval of the Secretary of Agriculture of all maximum price regulations concerning their sale.

Mr. Strong: Is there any contention that there is no such approval?

The Court: Yes, he said there never was any approval of any of the regulations until a certain date which he has set forth here, and that all of the prior regulations, maximum price regulations, regulating the sale of the price of sides and carcasses were not approved by the Secretary of Agriculture, and that it is conceded by the Office of Price Administration that that is so, and he has submitted Regulation 169 as of December 27, 1945 to show that it was not approved, and Regulation 169 approved August 30, 1946 to show the method of approval.

Mr. Robnett: That is correct.

The Court: Another thing, I do not know in that connection, counsel, whether or not it is within the period.

Mr. Strong: That is another point. It is not. It is within 30 days after arraignment or five days after judgment.

The Court: No, I mean within the period, the sales were within the period where the regulations

were not approved. These are dated April 1945, the 23d of April, 1945, the 4th of January, 1946, the 13th of February, 1945, and the conspiracy to and including June 30, 1946.

Mr. Robnett: Yes, but the overt acts, as you will observe, nearly every one of them is in 1945 long prior to the time when they started approving.

The Court: That I cannot go by. While it is true in a conspiracy case you must allege an overt act, the gravamen of the charge is contained in the conspiracy allegation, which is that on or about the 1st of May, 1944 and continuously thereafter to and including June 30, 1946. They might have done several overt acts before that and still conspired subsequently.

Mr. Robnett: Exactly so, but if I understand the rule correctly—I know in the state courts it is; I think it is here—that they must prove one at least of the overt acts they have alleged.

The Court: Yes.

Mr. Robnett: And there isn't one of them that is alleged, as I understand it, in 1946. They are all in 1944 or 1945.

The Court: That would not make any difference so far as the conspiracy is concerned. In other words, if the allegation of the conspiracy extended to a period of time when the regulation was approved by the Secretary of Agriculture, then your point would not be good. It might be if they did not you might have a failure of proof sufficient to support a motion for a judgment of acquittal after the Government's case in the other event, but I would not be able to grant any motion that you

have requested here on the face of the indictment.

Mr. Robnett: Well, all right. As to all the items, that would be before the first approval which I have submitted to your Honor.

The Court: Which is the first approval now?

Mr. Robnett. The first approval of Regulation 169 was August 3, 1945. Now that approval is only an approval of an amendment and 169 itself was never approved. So if we tried the validity of that and the Court determined that 169 in and of itself and all amendments up to August 3, 1945 was invalid, it would then mean that none of the evidence could go in even under the conspiracy item which would tend to show any violation.

The Court: It is not a question of the evidence going in now, it is a question of whether or not I can tell from the face of this indictment that you have a point which might be well taken. In other words, can I tell from the face of this indictment that it was the kind of meat and from the face of the indictment and the approval of the regulations, does it cover a portion of the period alleged in the conspiracy?

Mr. Robnett: It does cover a portion of the period at least, your Honor, and it covers all of the overt acts as to the times that are alleged.

Mr. Strong: I might say I am not participating much in this discussion because I am not acquainted with the administrative necessity for the Secretary of Agriculture's precise action, and I assume that if there is any question in your Honor's mind that I would have the opportunity of submitting a memorandum.

The Court: There is a provision in the act which requires the Secretary of Agriculture's approval on any agricultural commodity, and the cases hold that an agricultural commodity is not that which we ordinarily consider to be an agricultural commodity but those which arbitrarily have been established to be an agricultural commodity for the purpose of law.

Mr. Robnett: Now, your Honor, at least as to Counts 2, 3 and 5, as the indictment reads, this motion—I mean this particular Regulation 169 and the amendments would apply, because those are shown to be in April and February of 1945.

The Court: Yes, that is correct, but I do not think that it would be wise or just for me to give you permission to file suit on part of an indictment. If you are entitled to file the suit and part of it might be good and part of it might not be, then if it eventuates in a conviction, I at that time still have jurisdiction to permit you to take either all or a portion of it to the Emergency Court of Appeals.

Mr. Robnett: Well, possibly you are correct in that.

The Court: I cannot see how I can go along with you on your conspiracy count. On the others I can see your point.

Mr. Robnett: The only thing is this, your Honor, there is a case holding that they were not allowed to do something, that is, to raise the point because it said they had never invoked their right to have it tested before the trial in the Emergency Court of Appeals. We are seeking to get away

from that case by invoking that right and that privilege and asking for mere authority to sue.

The Court: If you are granted authority then these proceedings are stayed.

Mr. Robnett: They should be stayed until that is determined.

The Court: What is that section?

Mr. Strong: 924(d). It is right at the bottom, where it says "within 30 days after arraignment."

The Court: I have the act here which has a different number.

What did you set forth here as your reasonable and substantial excuse for not presenting this in a protest to the administrator in accordance with Section 203 of the Act?

Mr. Robnett: The only thing we set forth here is that it was not until the decision of the Suwanee Fruit & Steamship Company case that we were familiar with the rights to contest the validity on the ground that the agricultural commissioner had not signed. We have never filed any protest against the act itself and we didn't come in here with a motion sooner because of the fact that that Suwanee case just came down on April 9th of this year.

Then there is the case of Utah Junk Company vs. Porter, Price Administrator, which was decided February 26, 1946. We have the advance edition here in Volume 328 U. S. No. 1 at page 39, in which it said that such a protest could be filed at any time.

Mr. Strong: Within the Court's discretion.

The Court: A protest to the Administrator?

Mr. Robnett: Yes, your Honor.

The Court: But you did not file a protest?

Mr. Robnett: Not yet, but we intend now to file this other proceeding, which would be in the nature of a protest, and pass on the validity.

I do not think in the Suwanee case, as I recall it, that there had ever been any protest filed. There they brought a suit.

The Court: I do not have the Suwanee case.

Mr. Robnett: I think we have it here.

The Court: Is it in the advance sheets?

Mr. Robnett: Yes, your Honor. I can give you my copy of the decision.

Mr. Strong: Is that the only copy you have?

Mr. Robnett: That is all we have; yes.

(The volume referred to was passed to the Court.)

Mr. Robnett: Your Honor, I wish also to call your attention to the case of Ben H. Rosenthal & Company vs. Porter—they are companion cases—and in these cases it shows that they come under this very Regulation 169 and they filed those cases, or they initiated them in that court by filing a complaint pursuant to leave granted by the United States District Court of the Northern District of Texas. In that court criminal proceedings are pending charging the present complainants with illegal sale of beef carcasses at prices in excess of the maximum regulations.

That case, after decision by the Circuit Court of Appeals, has now been certified to the United States Supreme Court and certiorari granted, so it is there pending.

There you will see they obtained leave of the court in a criminal case such as this to do the very thing we are asking the privilege to do. This is a very recent case. I believe the date was November 26, 1946.

The Court: I think it is a matter of discretion of the court, that is, the trial court, as to whether or not it should be granted. But I know it would be an abuse of discretion of the trial court if I were to grant it on the facts set forth in this indictment. I do not even have an affidavit from either one of the defendants that that is what they sold and that they didn't sell anything else, and what the Government charges them with here in the conspiracy to sell meat.

Now certainly not all the meat covered by Regulation 169 is to be regarded as an agricultural commodity under the terms of the arbitrary standard set forth in that provision.

Mr. Robnett: The application here is a verified application by the defendant Sam Ormont in which he sets forth the only meat they had. They did have veal and beef carcasses. That stands undenied.

The Court: Let me see. That is Sam Ormont's affidavit?

Mr. Robnett: That is the application itself. This application was drawn as a verified application and you will find the verification on page 6.

The Court: Where is that paragraph?

Mr. Robnett: If your Honor will go back into it, on page 3 at lines 2 and 3, it alleges that the busi-

ness engaged in is a slaughterer of livestock, consisting solely of cattle and calves.

The Court: Certified as a non-processing slaughterer.

Mr. Robnett: Yes. And on lines 6 and 7 it states "during said entire period, said applicant sold only beef and veal carcasses, and did not sell any wholesale cuts." That had escaped my attention. So it is a verified fact before your Honor.

I cannot see the harm that results in allowing us to file suit, even though there is some delay, because if we do not succeed in that suit the sooner they can proceed with the trial of this action. If they do succeed to make it broad enough to cover all the regulations, if we do succeed in holding that those regulations are null and void and were *ab initio*, as they did in the Suwanee case, then the Government has no case whatsoever.

Mr. Strong: They can do that after judgment, if it is true. I haven't had a chance to look into it and I don't know where the Suwanee case is from.

The Court: Suwanee Fruit and Steamship Company vs. Fleming, United States Emergency Court of Appeals, decided April 9, 1947.

Mr. Strong: Thank you, your Honor.

The Court: I do not think that would be in the advance sheets yet. However, it may be.

The thing that is in my mind, Mr. Strong, is that on his showing here, his verified showing—and you are going to file some telegrams or letters. were you not, from the OPA, or something?

Mr. Robnett: I could file them. I merely mentioned that we have had it verified and had the oath taken as to which ones had not been approved and which ones had been.

The Court: Very well. In view of that, as to those he would be entitled to file a suit. The question in my mind was whether or not on the conspiracy count he would be entitled to file a suit. That turns on two questions, first whether or not the meat charged there is solely beef carcasses and not wholesale cuts, that is to say, those kind of merchandise which are described as agricultural commodities rather than those which are not and which may be regulated without prior approval of the Secretary of Agriculture. In view of the defendant's affidavit and showing under oath that that is the only thing in which he dealt, or in which they dealt, it seems to me that they have made a sufficient showing to overcome that difficulty in connection with the conspiracy charge.

The next thought in my mind is whether or not, in view of the fact that the indictment alleges a conspiracy up to June 1946, which latter date is subsequent to the date of certain amendments being approved, the defendant would be entitled under any consideration to permission to file such a suit. His position is that they only approved amendments.

Mr. Robnett: That is correct.

The Court: That would take away from this court, by virtue of that, the jurisdiction and power to determine at the time of the trial if the amend-

ments were valid or the basic regulation was valid and applicable to this defendant.

It would also seem to me, in view of the allegation of the conspiracy beginning at that period of time, that if the major portion of that time, if there was no valid regulation, that it might well be that the Emergency Court of Appeals, if they held the regulation void, as a result of that hearing that the indictment wouldn't state an offense.

I am inclined to think, Mr. Strong, that they have the permission to file the suit in the Emergency Court of Appeals.

Mr. Strong: I would like 10 days to answer.

The Court: I cannot give you 10 days. They are both set for trial tomorrow.

Mr. Strong: We can't try both tomorrow.

The Court: We can try one.

Mr. Strong: We can take the OPA case off calendar until I answer it, because this is an important matter.

The Court: It is important. We will let the Emergency Court of Appeals decide it.

Mr. Strong: Maybe the facts aren't accurate. I may challenge them and your Honor may have to hold a hearing to determine what the facts are. Possibly there are regulations where there is a signature of the Secretary of Agriculture and maybe it isn't even necessary. I would like to have an opportunity to be heard on that. I cannot conceive that all of these regulations at the time that this act was passed, after so many years of attempting to enforce them, that the regulations aren't valid

on their face is as simple as counsel states it. I would like to look into it before your Honor refers us to the Emergency Court of Appeals.

The Court: The Emergency Court of Appeals held they were invalid in the Suwanee case.

Mr. Strong: May I have until Monday? I will be in trial beginning tomorrow, so even that is not much time.

The Court: The general idea is that these things ought to be disposed of promptly. I cannot see what harm can come if I grant permission to the defendants to file the suit. It looks to me like a reasonable question in view of the Suwanee holding. The defendant is not merely proffering something here for purposes of delay, but it looks as though he may have a question that might be a well taken question. If I can grant him permission, he has to go to the Emergency Court of Appeals and practically get their permission to file a suit, and if they say no, why then he is back here. If they hold that the regulation is good then you can still try your criminal case, and if you try the criminal case and then they went up and it was held that it was bad you would have wasted a lot of your time, a great deal of valuable and diligent work and effort which you could spend usefully on other things.

Mr. Strong: Let us assume that I can show you by Monday that it should not go to the Emergency Court of Appeals.

The Court: It would seem to me that in the long run the matter would be disposed of better if I grant the request. The only question that I am con-

cerned about, counsel has filed his verified petition and has stated that he bases his verification as to that upon information received from the Office of Price Administration, or some office here.

Mr. Robnett: From the Department of Agriculture.

Mr. Kosdon: From the clerk's office of the United States Emergency Court of Appeals.

The Court: If you can furnish me any information—what date is Monday?

Mr. Strong: You see, I don't have the advantage of those telegrams. I have to start getting them now.

The Court: I think you would probably do that by Friday, Mr. Strong. The only question I am interested in is whether or not the Secretary of Agriculture did or did not approve any of these on or about—what date was it? You can have the whole history of his approval of these various regulations and you can have that by Friday, I am sure, by the use of the teletype.

Mr. Strong: I will try.

The Court: So I will continue this matter until tomorrow morning—we will all be here anyway—and thereafter continue it from day to day until Friday.

The motion for immunity will be submitted and as soon as Mr. Strong gets a chance he will send down the transcript with Mr. Ormont's testimony. That motion is, I note, made only on behalf of Ormont and not on behalf of Himmelfarb.

Mr. Robnett: That is correct.

Los Angeles, California, May 26, 1947

10 o'Clock A.M.

The Court: Ex parte?

Mr. Strong: As to the motion on Case 19094, I am not prepared as yet. I notice it was put at the end of the calendar. I wonder if it could be put over until tomorrow. We have a telegram from Washington saying they haven't been able to get the material together.

The Court: Counsel are entitled to a ruling on it in sufficient time to file a complaint before the 1st of June.

Mr. Strong: I will agree to have the trial put over so that they will have sufficient time to get their material together.

The Court: It is not a question of getting the trial put over, it is a question of getting their complaint filed in the Emergency Court of Appeals before that date. In other words, I have to act on their motion now.

Mr. Strong: Of course I can argue just on the amendment. I think on its face it shows there is no ground for going to the Emergency Court of Appeals. But we were looking for further details to assist your Honor in reaching a conclusion.

The Court: I will hold it until I get it on the calendar.

* * * * *

The Court: Mr. Strong, when can you be ready in this other matter? On the present state of the record it would seem to me that I would have to grant the petition to file a suit in the Emergency Court of Appeals.

Mr. Strong: Except with this possibility, if your Honor will take a few minutes to examine the statute as it was originally enacted and as it was amended, I think you will see on the face of the statute that the Secretary of Agriculture's approval doesn't come into play until July 1, 1945. And I have references to the Federal Register now which will show that on and after July 1, 1945 he approved everything he had to approve.

If your Honor is not convinced that the language in the amendment which I say is the language which brings in the Secretary of Agriculture with reference to these particular defendants, that it does do so, then what I am getting now is more authority to show that that language covers cattle, and as to that I have a telegram from the Assistant Attorney General dated the 23rd which says it is impossible to obtain all information desired today. Will advise you later. I assume he means today or tomorrow by "later."

But here is the language that I want to point to, your Honor, and I think this is very important—

The Court: They served me with a brief five days after the brief was argued before the Supreme Court where I was a party defendant, so I do not know what they mean by "later."

Mr. Strong: The language which brings the Secretary of Agriculture's approval into this matter is that contained in the amendment which went into effect as of July 1, 1945, and the language is:

"Feed product, processed or manufactured in whole or as a substantial part from any agricultural commodity."

Now that language is the language that brings in livestock and cattle. That gets into the statute for the first time as of June 3, 1945. Subsequent to that date all of the necessary changes in amendment were signed by the Secretary of Agriculture.

The Court: What section of the act as originally enacted?

Mr. Strong: It is 903(e).

The Court: That is the code?

Mr. Strong: That is 18 U. S. C.; yes.

The Court: Is that 3 or 5?

Mr. Strong: I guess it is 203. Maybe it is 3. I have the code without the other numbers.

Mr. Kosdon: I believe that comes in under Title 50 and appendix.

The Court: I have the act here and it indicates in the text of the act by footnote each sentence and clause that was added and the date of its addition, so if you have the section I can find it.

Mr. Kosdon: 903(e), Section 3.

The Court: It is Section 103 of the act.

The act as originally amended provided:

“Notwithstanding any other provision of this or any other law, no action shall be taken under this act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture.”

In 1945 the language, with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture” was changed to read

“without prior written approval of the Secretary of Agriculture with respect to any agricultural commodity or with respect to any regulation, order or price schedule or other requirement applicable to any processors with respect to any food or feed product processed or manufactured in whole or a substantial part from any agricultural commodity.”

Mr. Strong: That is the point.

The Court: That was the change. In other words, under the original act the agricultural commodity was not cattle.

Mr. Strong: No, and it became that by virtue of the language, “applicable to any processor with respect to any food or feed products processed or manufactured in whole or in substantial part from any agricultural commodity.” That is where the cattle come in.

And the thing, your Honor, that I have asked the Department of Justice to supply are the hearings and the reports before the various branches of Congress, so if your Honor has any doubt as to the fact that this language that I have read means cattle, I want to bring further expositions by the various senators and representatives.

The Court: The difficulty is that the power is taken away from me to determine that. In other words, if it becomes a matter of construction I have no power to construe it.

Mr. Strong: Unless the language of the adopters of the amendment is so clear that there isn't any question.

The Court: It might be very clear to me but I might reach one conclusion which the Emergency Court of Appeals might say was very clear to them but exactly the opposite, and they have the power to decide that and I do not. In other words, if it is a matter of construction of this statute or of the regulation that is issued under it, I just do not have any power to construe it.

Mr. Strong: That would apply to almost every word of the statute or regulation if it were doubtful.

The Court: If the question is raised.

Mr. Strong: Well, that is exactly what I am trying to get, your Honor.

The Court: As to the validity of it. In other words, like in the recent cases I issued it there because somebody raised the question of what was meant by "rent," whether or not Mr. Auerbach's collection of what he termed a service charge was rent. So I think here that in view, as I say, of the present state of record, I will have to grant this motion. There is no substantial harm that can come to the Government by virtue of it.

Mr. Strong: May I state for the record what it is that I am trying to get so that there won't be any question about it?

The Court: All right.

Mr. Strong: What I am trying to get is reports of the various hearings held before the different branches of the Congress and their committees and subcommittees in discussing this particular amendment which was subsequently enacted as was read.

to show that by the words "the product" and the various other words, this change which your Honor indicated meant cattle.

The Court: Your position is that they enlarged "agricultural commodities" to include cattle by the amendment and it was not included originally?

Mr. Strong: That is right.

The Court: I think I understand your position.

Mr. Strong: And further that subsequent to June 30, 1945 every amendment to every one of the maximum price orders, revised maximum price orders, and other documents involved in this case that were issued by the Office of Price Administration were approved in writing by the Secretary of Agriculture, and I have the references to the Federal Register, which I assume your Honor doesn't want in view of your intended ruling. But they were all approved, every amendment was approved, subsequent to June 30, 1945.

The Court: The motion for permission to file suit in the Emergency Court of Appeals is granted in Case 19094 to the defendants named.

The motion for dismissal——

Mr. Kosdon: If the Court please, before you rule on the motion for immunity, I would like to give several additional citations.

Mr. Strong: Just a moment. I haven't supplied them with the transcript yet. I don't think your Honor would want to rule on it until then.

The Court: The motion for immunity of the defendant Ormont will go off calendar to be reset upon disposition of the case by the Emergency Court of Appeals.

Mr. Robnett: Will there be an order of abatement for this particular criminal case pending that matter?

The Court: The statutory order of abatement pending the determination by the Emergency Court of Appeals is likewise granted.

Mr. Strong: I understand that they must perfect their complaint and appeal within a certain number of days.

The Court: That is up to them. All I am doing this morning is granting their motion.

Mr. Robnett: Should I prepare a written order, your Honor?

The Court: I think probably there should be a written order.

Mr. Robnett: Very well. We will prepare one.

Mr. Strong: May I ask this, if your Honor doesn't mind: I assume, in view of your Honor's ruling, there is really no point to the Attorney General's office getting the materials together because, as I gather, regardless of what those hearings will show your Honor still considers that a matter of construction to be determined by the Emergency Court of Appeals?

The Court: Yes. However, I think the Attorney General's office will probably want to get it ready to respond to their suit because they say they are going to file a suit.

Mr. Strong: As I understand, it won't make any difference as to what comes up here because it would then be a matter of construing the statute, which your Honor feels the Emergency Court of Appeals should do.

The Court: I think the Emergency Court of Appeals has the jurisdiction and I do not. There should be a recitation in the order that the objection is made in good faith and that there is reasonable and substantial excuse for the defendants' failure to present such objection in a protest, and so forth. In other words, you have to conform to the statutory language.

Mr. Robnett: Yes, your Honor.

The Court: Very well.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 31st day of July, A. D., 1947.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed Aug. 1, 1947.

In the District Court of the United States in and
for the Southern District of California,
Central Division.

Honorable Peirson M. Hall, Judge Presiding
No. 19138, Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAM ORMONT and PHILLIP HIMMELFARB,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff: James M. Carter, United States
Attorney, Los Angeles 12, California; by William
Strong, Assistant United States Attorney.

For the Defendant, Ormont: Daly B. Robnett,
Esq., 1007 Spring Arcade Building, Los Angeles
13, California; and Benjamin F. Kosdon, Esq., 1007
Spring Arcade Building, Los Angeles 13, California.

For the Defendant, Himmelfarb: William Katz,
Esq., 415 Chester Williams Building, Los Angeles
13, California. [2*]

Los Angeles, California, May 23, 1947

9:30 o'Clock A. M.

(The following proceedings were had in
chambers, Court, counsel and defendants pres-
ent:)

Mr. Robnett: Your Honor, I do not want to

make this motion or make any statements concerning it while there is a prospective jury present. That is why I asked to come in here at this time.

At this time, on behalf of the defendant Sam Ormont, I wish to make a motion to dismiss—I believe that covers that now—and to enter a plea of once in jeopardy, based upon the record in this case before your Honor, the minutes in this case, showing that a jury was duly impaneled and sworn to try the defendant and has since been discharged, and that the impaneling and swearing of that jury to try him constituted jeopardy. Therefore I move to dismiss as to him on the ground that he has been once in jeopardy.

I do not know whether it would be proper to let him enter the plea of once in jeopardy or not. I believe under your new rules a motion to dismiss covers it.

The Court: I think so. Do you want to join in the motion?

Mr. Katz: I do not, your Honor. In that connection, I think I owe the obligation of this court to say that I do not feel I should join in that motion on behalf of the defendant [5] Himmelfarb. I made the motion to your honor in good faith and I requested the ruling that your Honor made.

The Court: I understood it was joined in by both defendants.

Mr. Strong: That is what the record shows, your Honor.

Mr. Robnett: If that is the understanding of your Honor, I know you acted under that understanding then, but I did not understand that we

joined in any motion. It was not my intention. However, I did not state anything to the contrary. I was ready to make some other motions and had my authorities there. I thought our original stipulation—maybe you did think it covered it—but my understanding of the stipulation was that it was to apply during the trial to objections to questions pertaining to evidence. But if it is your understanding that it applied also to motions of this character that was made by Mr. Katz in behalf of his client, then of course I do not want to take the position——

The Court: The motion of course went to the heart of the case of both defendants.

Mr. Robnett: Exactly so, although I did not intend to make that specific motion. If your Honor feels that that was the stipulation, I know you acted accordingly then.

The Court: I was under the impression that the motion was made on behalf of both defendants. Even so, in considering the matter on the merits, I do not think the motion for a [6] once in jeopardy plea is well taken. While the jury was sworn, there was not even a witness sworn, no opening statement to the jury, and there was nothing that the jury could decide it on. There was no evidence, no presentation of any kind, and I think there has to be more than the mere swearing of a jury to place a defendant once in jeopardy. The motion will be denied.

Mr. Robnett: Very well.

The Court: Do you have some other motions you wish to make out of the presence of the jury?

Mr. Katz: Before we go into any other matters, I am in an awkward position, I feel. I want to make this explanation to the Court. I made the statement to your Honor and I made that motion in good faith. I don't make motions or ask for rulings to lead the Court into error. It was my understanding at the time that your Honor expressed it that in making the motions that unless it was specifically declared otherwise it applied to both defendants.

On this matter of the motion coming up, there was never any contention that it be otherwise, and I want your Honor to know it, and that that has been my position. I am somewhat caught by surprise in so far as this motion is concerned.

The Court: I do not think anybody need to feel awkward about it. Mr. Robnett owes the duty to his client to make a motion if he thinks that under the law he is entitled to make [7] it.

Mr. Robnett: Precisely.

The Court: It isn't my lawsuit. People do not try lawsuits to please me. It is your day in court.

Mr. Robnett: That is right, your Honor.

The Court: Do you have any other motions to make out of the presence of the jury, either of you?

Mr. Robnett: We have not received the transcript of the testimony of our defendant before the grand jury, which I understood was to be written up for us.

Mr. Strong: It takes a little time, your Honor.

Mr. Robnett: Yes, I realize it does. I didn't know how long it was.

I wouldn't have any motion until I see that, your Honor. I couldn't tell whether I have any or not until then.

Mr. Strong: That refers to another case, your Honor. I would like the record to show that.

The Court: That is the transcript that I referred to yesterday, I understand.

Mr. Robnett: Yes.

The Court: Well, your motion for a dismissal now on the ground that the defendant Sam Ormont was called to testify against himself in the indictment as based on that, that is, as to the OPA case—

Mr. Robnett: Yes. [8]

The Court: You are not making that motion in this case?

Mr. Robnett: I expect I will want to make it when I see the evidence, but I would like to see the evidence so that I could make it if I feel that it would have any application in this case. I do believe that it probably did have since I heard counsel say that there were bills of lading or some invoices or something.

The Court: Invoices.

Mr. Robnett: I think that that matter, from counsel's statement, that is, counsel of the Government, as to what he proposed that he was going to introduce or try to introduce, that it would appear that that motion would be good here.

The Court: If you wish to make the motion as a matter of record to protect your record at this time, I will deem it made on the same grounds in this case that you made it in the other case.

Mr. Robnett: I would like to have it so considered then, your Honor, and that that transcript be considered on that motion.

The Court: I will deny the motion without prejudice to its renewal.

Mr. Robnett: Thank you.

Mr. Katz: If your Honor please, I want to avoid—let me say first I had anticipated requesting the Clerk for a conference with your Honor before the opening statement. As [9] long as we are here together I will avail myself of the opportunity to make the statement now.

I want to avoid a repetition of what has heretofore happened in this case. I also want to avoid any prejudice that may result to the defendant Himmel-farb as a result of the statement that was made by counsel to your Honor yesterday at the conclusion of the case, that he intends to show OPA violations in this case. If that matter is one that is going to be touched on by him in the opening statement, if he intends to go into it inasmuch as he disclosed that fact to the Court, I think it is something that can properly be considered at this time.

The Court: Yes. I think it would be inappropriate for counsel to refer to other violations of any other statutes in his opening statement.

Mr. Strong: I don't intend to.

The Court: This is an income tax case and a question of how much money a man got and how much money he reported and how much he owed.

Mr. Strong: I don't intend to make a statement as to the other violation. What I merely meant to

say was that the source that was unreported comes from the overcharge of meat.

The Court: I may even think that that would be inappropriate, to say that it comes from the overcharges in meat, because that is a matter to be tried. [10]

Mr. Strong: Yes.

The Court: That is a matter to be determined, whether or not it was an overcharge or was not an overcharge in meat. The defendants have not been convicted of any such thing. No one can testify on it even, that it was an overcharge in meat.

Mr. Strong: I didn't intend to discuss it in my opening statement in any way.

The Court: I think all references to overcharges, I mean an OPA violation, should be carefully avoided in the conduct of the trial because we might again find ourselves in the situation where we have to declare a mistrial.

Mr. Strong: I don't understand that to mean that my witnesses cannot testify that they paid a certain amount and in addition that they paid some more.

The Court: That is true. But a witness cannot testify that he violated the law in doing it or that it was an overcharge. He can testify as to the amount of money that he paid, whether he paid it once or twice or three times, or on any such occasions. But any inference or implication or insinuation that such conduct on the part of the defendants was a violation of the law would, in my judgment, require me to give serious consideration to another motion for a mistrial.

Now do you have some other motions?

Mr. Katz: I just want to make this statement. I think [11] it is correct to say that before the Government can go into any matters of any receipts or matters of income, that they are required to show that a given amount was reported.

The Court: That is up to the Government to prove their case. They usually start off by introducing the income tax returns.

Mr. Strong: That is item No. 1.

The Court: That is the first step. They start out in these cases with the return.

I think another matter of record ought to be shown out of the presence of the jury. I talked with the Clerk, Mr. Clifton, yesterday evening and asked him whether or not he had called any of the jurors who had been on the panel yesterday. Their statement was made in the presence of the whole panel. He advised me that this was an entirely new panel of jurors and that none of them were called or are here that were on the panel the day before yesterday.

Mr. Robnett: There is one name that was on the list of names before, but I don't know that the party was here.

Mr. Kosdon: He is not here.

Mr. Robnett: Another matter——

The Court: You have called the roll, Mr. Clerk?

The Clerk: Yes. All but four are present. And they are on the way.

The Court: Does your roll call show that any of the [12] jurors are present who were present the other day?

The Clerk: No.

The Court: Very well. The record will be clear on that. I thought that it ought to be stated out of the presence of the jury also.

Mr. Robnett: Thank you, your Honor.

Now in order to keep our record straight, and basing this upon the statement of counsel as to certain evidence he will probably offer, at this time I also make a motion to suppress any and all evidence pertaining to matters with regard to meat or prices of meat or the sales of meat and any and all invoices of the defendants, or of either of them, or of the Acme Meat Company, on the ground that the defendant Sam Ormont, under subpoena before the grand jury, was required to and did testify in connection with some of such matters and did testify with regard to certain invoices and therefore he should be immune from prosecution and that the evidence should be suppressed and no evidence of any testimony he so gave or anything connected with that testimony should be introduced against him in this case.

The Court: I don't know. I am in the dark on it because I don't know what is going to be introduced or offered. I think you will have to make that objection at the time.

Mr. Strong: I will state now that I am not using any of the documents that he produced before the grand jury in connection [13] with his dealings

with Mr. King or the Southern California Meat Company. I am not using them. They don't show anything.

The Court: I will have to deny the motion.

Mr. Robnett: Without prejudice, your Honor?

The Court: I haven't anything before me. I will just deny it. It is without prejudice to its renewal in the event that you deem it necessary, in the interests of your client, to renew it.

Mr. Robnett: I see. Very well.

I don't believe this would be the proper time for the making of a motion which I had intended to make yesterday before the evidence started, and that is a motion based upon the lack of a bill of particulars.

The Court: I think that motion, for the purpose of the record, would have to be made after the swearing of the witness, the asking of the first question and before the answer.

Mr. Robnett: Very well. [14]

(The following proceedings were had in open court:)

The Court: Any *ex parte* matters?

The Clerk: No, your Honor.

The Court: *United States v. Ormont and Himelfarb*.

Mr. Strong: Ready, your Honor.

Mr. Robnett: Ready.

The Court: The defendants are present in person and by counsel?

Mr. Robnett: Yes, your Honor.

Mr. Katz: Yes, your Honor.

(At this point a jury of 12 and one alternate were duly impaneled and sworn.)

The Court: Is it stipulated that each of the jurors is present in his or her place?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

The Court: And the defendants are present in person and by counsel?

Mr. Katz: So stipulated.

Mr. Robnett: So stipulated.

Mr. Strong: So stipulated.

The Court: This is the time for the making of the opening statement by the Government.

Mr. Strong. [15]

Opening Statement in Behalf of the Government

Mr. Strong: Your Honor, gentlemen, ladies and gentlemen of the jury, this is the time, as his Honor told you, for the making of the opening statement by the Government.

Of course you realize that what I tell you is not evidence in this case, it is not proof; it is just a statement of what I hope to be able to prove to your satisfaction. But it gives you a sort of a general outline of what we are putting evidence in for and what we expect to prove ultimately. It is like getting the outside view of a jigsaw puzzle. You look at the cover of the box and you get a pretty good idea as to what to do with the pieces when they

start coming out, and the pieces will of course consist of the testimony and other evidence which we put into the record.

What I hope to prove through these witnesses and through the other evidence is simply this—and I might point out at this point that although this is an income tax case, and although it involves money, accounting, accountants, and things of that kind which may be a little confusing to some people, which may be foreign from what you are accustomed to doing—essentially it is a very simple matter, because what the Government charges, as contained in the indictment, is simply this, that these defendants—or take them separately—that the defendant Sam Ormont during the year 1945 filed an income tax return, like everyone in the country who has a [16] certain income has to file a return. He filed one too. And on his income tax return he stated how much his income tax was, and he computed it just as you and I computed the tax on it, and he stated the tax on the income tax return. And he signed his name and he said that that was how much money he earned during that year 1944, and on which he had to pay a tax, and he said what the tax was.

What the Government charges is that Mr. Ormont didn't tell you the whole story. The amount of money that he put on his income as his taxable income wasn't all of his income. There was more income, a lot more income. And the Government will try to show you that in addition to the income which he reported on his income tax return he had

a lot more income, and that he didn't report it on his income tax return and that he didn't pay a tax on it. It is as simple as all that.

As to Count 2 we will show that Mr. Himmelfarb filed an income tax return covering the year 1944, and he also stated what he said was his income and he stated what he said was the tax. Now the only thing that is difficult about that, the only thing that the Government says is wrong with that, is that he didn't tell you the whole story on that return. He left out a lot of income. We are going to show you this extra income. We are going to show you that there was extra income, and that it was the kind of income on which he had to pay a tax and he had to report it, and he didn't do it. That is all [17] there is to that.

Of course as to Counts 1 and 2 we charge both of them together in each count, and we will try to show you, that as to Mr. Ormont's income for 1944 he didn't do it alone but he did it together with Mr. Himmelfarb. The two of them helped to put this thing across.

As to the second count which charges with reference to Mr. Himmelfarb's return for the year, it was Mr. Himmelfarb, together with Mr. Ormont, who is responsible for the fact that on the income tax return for Mr. Ormont for 1944 the whole income hasn't been reported and the whole tax hasn't been stated or paid.

As to Count 3, we will show you that in 1944, that is, the preceding year, Mr. Ormont filed an income tax return for the year 1943, and there again

the same thing happened. He stated what his income tax was for that year, he stated what the tax was, and we claim that he didn't state the whole thing. He had a lot more, and we will show you that he had a lot more.

We will also show you that the additional amount of many was money which was taxable as income, and we will show you how much tax he should have paid on the additional amount that he didn't report.

In the last count we will show you that in 1943, when you had to file income tax returns for the preceding year for [18] 1942, Mr. Ormont had done exactly the same thing. He had stated what his income was for 1942, he had stated what he had computed his tax to be, but the trouble is he didn't tell the whole thing. He had a bigger income and he should have paid a bigger tax.

In connection with each of these counts we will show you that it wasn't just an honest mistake, that it wasn't just an oversight on his part, as sometimes may happen, and it wasn't unintentional. We will show you that it was a deliberate and willful act on the part of the defendants charged in each of those instances and that they willfully concealed or attempted to conceal the true income which they had.

You will hear a lot of witnesses, both for the Government and the defense, I assume, but there is one thing that is important and that we are going to show through all these witnesses, regardless of how many figures there are and what discussions there

are. Ultimately we are going to show you that in addition to the amount reported as income for each of these years for each of these defendants, he had more income, he knew he had it and he willfully concealed it by not reporting it.

That is all that the Government's case consists of, and that is all that these witnesses will be brought in to show, just those things, that a certain amount of income was reported, additional income was earned but wasn't reported and [19] it should have been reported, and the failure to report this additional amount was willful and deliberate, and they knew what they were doing when they didn't report it.

That is the Government's case, ladies and gentlemen.

The Court: Do you desire to make your statement now or reserve it to a subsequent time, either of you?

Mr. Katz: If the Court please, I would like to make my opening statement at this time. I understand that Mr. Robnett, on behalf of the defendant Sam Ormont, wishes to reserve it.

The Court: You wish to reserve your right?

Mr. Robnett: Yes, your Honor.

The Court: Very well.

Opening Statement in Behalf of Defendant Himmelfarb

Mr. Katz: May it please the court, Mr. Strong, counsel, and ladies and gentlemen of the jury, you have heard Mr. Strong's statement. You will also

hear the evidence. I believe that the evidence will show that the defendant Himmelfarb is a humble citizen and an ordinary taxpayer like you and I and the millions of others who are citizens and taxpayers of this country.

I believe the evidence will show that the defendant knows no more about the intricacies and the complexities and the ramifications of income tax returns than you and I and the millions of other ordinary and humble citizens who pay taxes, and that I think were no less confused and bewildered and befuddled than are all of us when we read and understand and try to figure out, not alone the income tax return, but the explanations of what you are supposed to do with that return. And consequently that the defendants, like most of us, go to the bookkeepers and to the auditors and to so-called tax experts to get them to do for us what most of us feel we cannot safely do alone, and that the defendant Himmelfarb, on whose behalf I address you, presents his information that is asked of him by the individual or the person who is supposed to be skilled in the making out of the return, just does what he is told to do with respect thereto, and signs what is before him as being the true and correct and proper way of handling that matter.

Actually I feel certain that after hearing the testimony that you will find, and that the evidence will show, that this case springs from a difference of opinion between the Collector of Internal Revenue and the defendant as to when his taxes should have been paid. I make that statement because I believe

that the evidence in this case will actually show—and I believe that the government's own evidence and that the government's own contentions will establish—that there not only was and is do tax due and owing but the defendant Himmelfarb has paid not only all of his taxes but actually has overpaid his taxes and is entitled to a refund.

The difference between the government and the defendant Himmelfarb at least amounts to this: The government claims that certain income which the defendant reported and paid in 1945 and which the defendant Himmelfarb believed to be reportable and payable in 1945 should have been reported and paid in 1944. The fact is that the amount that the defendant Himmelfarb paid in 1945 and which the government claims should have been reported in 1944 as income for that year rather than 1945 is added to the 1944 return in accordance with the government's contentions and consequently deducted from the 1945 return in which it was included, the result is that the amount by which the 1945 tax is reduced is greater than the amount by which the 1944 tax is increased. That results from the difference in brackets. You know that as you pay taxes your taxes increase depending upon the income bracket in which you fall, and that the reduction of the 1944 tax brings the income down to a lower point for 1945 than the addition of that same amount to the 1944 tax will bring him up in the way of bracket. And consequently under the government's contentions, and as I understand those contentions up to this point, on the basis of their own

evidence it will show that there not only has not been a failure to pay but that the result is an over-payment of tax. Consequently a lesser amount was due in 1945 than was actually paid, a greater amount if the government is correct, would have been due in 1944, but the total amount for both years by the defendant Himmelfarb is less under the government's claims and contentions, the evidence will show, than the total paid by the defendant Himmelfarb for those two years.

The defendant Himmelfarb is not concerned with counts 3 and 4 of this indictment at all. Those are not directed to him. He is not named or in any way affected thereby.

Count 2—and I take these backwards, 3 and 4, and 2 and 1, because it seems just a little more logical to take them that way, having started out with 3 and 4, and which do not affect him at all—count 2 is directed against the defendant Himmelfarb and concerns the return filed by him for the year 1944. [23]

The defendant Himmelfarb is also mentioned in Count 1, and that is directed to him in this way: Count 1 concerns itself with the defendant Sam Ormont's 1944 return, but the count is directed against the defendant Himmelfarb as well as the defendant Sam Ormont upon some theory, as yet unknown to me and as yet unexplained, that in some manner or other the defendant Phillip Himmelfarb had something to do with the preparation or the filing of the defendant Ormont's return.

Ladies and gentlemen of the jury, I disclose no secret to you in telling you now that the evidence will show that the defendant Phillip Himmelfarb didn't and couldn't prepare and file his own return, let alone prepare and file returns for other persons, and that the evidence will show that the defendant Himmelfarb had nothing whatsoever to do with the defendant Ormont's return, knew nothing about what was included, what was set forth therein, or any phase of it.

That, ladies and gentlemen, I believe you will find to be the evidence that will be presented here. Thank you.

The Court: The defendant Ormont reserves his right, which he may do under the law, to a subsequent time in the trial to make an opening statement.

Call your first witness.

Mr. Strong: May I have these documents shown to counsel and then I will offer them in evidence.

The Court: Let the clerk mark them in evidence first. [24]

Have you four?

Mr. Strong: Five.

The Court: They will be 1, 2, 3, 4 and 5. Then show them to counsel.

(The documents referred to were marked Government's Exhibits 1 to 5 inclusive for identification.)

(Exhibiting documents to counsel.)

Mr. Strong: May I have this one marked too, your Honor?

The Court: No. 6.

(The document referred to was marked Government's Exhibit No. 6 for identification.)

Mr. Strong: I offer in evidence Government's Exhibits 1 through 5 for identification which are certain photostatic copies of the income tax returns.

Mr. Robnett: You are offering them in evidence now?

Mr. Strong: Yes.

Mr. Robnett: If your Honor please, I object to them on the ground that they are incompetent, irrelevant and immaterial, and on the further ground that the indictment in this case does not state a cause of action against the defendant Sam Ormont, and the indictment coupled with the bill of particulars which was given, does not state a cause of action or an offense against the defendant Sam Ormont; and that in addition thereto, that for the lack of the allegations in the indictment and in the statements in the bill of particulars, the lack of them, that the defendant Sam Ormont is taken by surprise in the introduction of any evidence whatsoever.

I have a motion that I would like to address to your Honor alone in connection therewith.

The Court: Do you wish to join in the motion, Mr. Katz?

Mr. Katz: Yes.

The Court: You object to the introduction of any evidence?

Mr. Robinett: I object to the introduction of any evidence.

The Court: On the grounds heretofore indicated?

Mr. Robnett: Yes.

Mr. Katz: I will adopt that, if the court please.

The Court: Do you have any additional data or authorities in addition to that which you have heretofore presented?

Mr. Robnett: They were presented at one time, not to your Honor of course. I have some authorities. I want to get the books themselves.

The Court: Very well. The jury will be excused. We will have to recess this afternoon about 4:00 o'clock. I wonder if it would be convenient for counsel to return at 1:30 today. [26]

(Assent.)

The jury are excused until 1:30. You are admonished not to discuss this case with any person or among yourselves, nor to form or express a conclusion until it is finally submitted to you.

At 1:30 you will resume your places in the jury box.

(The jury retired from the court room at 12:00 o'clock p.m.)

Mr. Robnett: Do you wish me to present it now or at 1:30?

The Court: If you haven't anything new to offer, you can present it now. If it is merely a repetition of what has heretofore been put in your briefs, you may present it now.

Mr. Robnett: I have some authorities, unless your Honor has read the authorities that were submitted in connection with my motion for a bill of particulars. If you have read all those authorities I have no new ones to offer.

The Court: I have not read them all but I glanced at them, I think, sufficiently to be familiar with them.

Mr. Robnett: There are one or two of them that I thought would be quite pertinent, but if you have read them of course that is another thing.

There are three cases in particular relative to what should be contained in a bill of particulars in a case of [27] this kind.

The Court: I think it better to present this at 1:30. I will read the authorities in the meanwhile.

Mr. Robnett: Very well, your Honor.

The Court: Recess until 1:30 o'clock. All witnesses are instructed to return at that time.

(Whereupon, at 12:00 o'clock p.m., a recess was taken until 1:30 o'clock p.m., of the same date.) [28]

Los Angeles, California; Friday, May 23, 1947

1:30 o'Clock

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

The Court: United States v. Ormont and Himelfarb.

Mr. Strong: Ready for the government.

The Court: The defendants are present?

Mr. Katz: Yes, your Honor.

Mr. Robnett: Yes.

The Court: All right, Mr. Robnett. You have a motion to present.

I didn't read all of these cases, but I am familiar with the Schenck case and I read the Hargrove case. The Hargrove goes off on a point of wilfulness.

Mr. Robnett: You did not read the United States vs. Empire State Paper or United States vs. Farrington?

The Court: No.

Mr. Robnett: These are both the trial court's rulings and are in the supplement.

The Court: If you will hand them to me, I will glance at them.

Mr. Robnett: I will just get the pages, if you don't mind, and will hand them to you.

The Court: The clerk calls my attention to the fact that you haven't formally stated your motion for the record [29]

Mr. Robnett: Very well. I will do so now. I will hand your Honor these two books.

(The volumes referred to were passed to the court.) [30]

The Court: Well, these are both District Court cases, and while I certainly regard them as respectable authority, nevertheless they point out that the allowance or disallowance of bills of particular are within the sound discretion of the court.

Here in this case the District Judge on the demand for bill of particulars allowed it in so far as he thought it was necessary to inform the defendant to enable him to prepare his defense, and in so far as he was entitled to have it granted according to the allegations of the indictment on file.

Had I been hearing it at that time I might have reached a different conclusion. But I still think that that is the law of the case, and I still think that he granted the bills of particular in the particulars which he should have granted them and no more.

On the question of wilfulness, which some of your cases go to, the instruction which I will read on that to the jury I have here, I have compounded it from the leading case of Crawford—I can't think of the name of the case, 285 U. S., and also a Ninth Circuit case. As I understand the basis of your motion, I won't say the basis, but one of the elements which you assert as persuasive that you should be granted this bill of particulars is because your defense will be—and the government regardless of your defense should prove [31] beyond a reasonable doubt that the conduct was wilful, and that from this accusation it cannot be determined whether it was wilful unless and until you know the things that you are asking for in the bill of particulars.

Mr. Robnett: That is part of the grounds. The grounds are very numerous. To split them up, I am objecting to the introduction of any evidence on the ground that the indictment plus the bill of particulars are insufficient as against our motion for a bill of particulars and against our motion to dismiss——

The Court: To state an offense?

Mr. Robnett: To state an offense and to state it with enough particularity so that we could prepare our defense thereto. And that I was going to ask, without going over it in great detail, if it might be understood that my objections and motions are based upon each and all of the grounds and specifications I set forth in the motion for the bill of particulars in the original instance, which is on file herein and is in writing.

The Court: Yes.

Mr. Robnett: There are some great number of specifications there.

The Court: Yes, it may be deemed that your objection to the introduction of any evidence will be based not only upon your stated grounds but upon all of the grounds set forth [32] in your motion for bill of particulars.

Mr. Robnett: Your Honor, in addition to that, at this time I wish to add to my objection to the introduction of any evidence the further ground that the indictment is multifarious, each count is, for the reason that in the second count of the indictment they first enumerate, as you recall—

The Court: Yes, I remember the portion that is preceded by the Arabic numeral 2 in parentheses.

Mr. Robnett: "By concealing and attempting to conceal from the said collector and any and all proper officers of the United States the true and correct gross and net incomes received by him during the said calendar year and the sources thereof." None of that is covered by subdivision (b) of Sec-

tion 145. Those are only made misdemeanors and they are incorporated herein in this indictment for a felony, and supposing that the case went on to trial in that form the jury might find those particular things the defendants had done, those misdemeanor things, and yet render a verdict of guilty on each count, and we would have an apparent verdict of a felony rather than a misdemeanor, whereas they should not be before the court, in my opinion.

Mr. Strong: Your Honor, in that connection I would just like to point out the Supreme Court in the Spiess case which came down recently specifically pointed out that the big difference between 145(a) and 145(b), the former being the [33] misdemeanor and the latter being a felony, is in the amount of wilfulness and intent present, but that the elements of the offense are the same. In the one instance it is the failure to file a correct return to include those matters on the return which in and of itself gives rise to a violation, and in the second case it has to be a wilful attempt to defeat and avoid, which is just a little bit beyond the point of simply not returning, but in all other respects it is the same thing, and we are prepared to prove it was done wilfully, as is required by 145(b), and that is what we have alleged.

The Court: That doesn't seem to be the defendant's point. His point is that 145(a) makes the offenses there proscribed misdemeanors, and 145(b) makes the offenses there proscribed felonies. Now, your indictment here says that it is under Section

145(b). All of that portion of the indictment in each count down to the Arabic numeral No. 2 in parentheses in each count states an offense under (b). Defendant's point is from 2 on you state another and different offense, which is a lesser offense, to-wit, a misdemeanor, and that by a verdict of guilty on each of the counts neither the defendant nor anyone else will have a means of knowing whether or not they have been convicted of a felony or a misdemeanor.

Mr. Robnett: That is exactly right.

Mr. Strong: Which the government disputes on the ground [34] that 145(a) and 145(b) provide for the same type of an offense, except in one the element of wilfulness being much more aggravated it is made a felony, and in 145——

The Court: Even assuming that you are correct, that doesn't meet defendant's objection.

Has this objection been heretofore advanced?

Mr. Robnett: I believe it was in my motion to dismiss, but I won't state definitely. I had a very lengthy motion and a great many grounds, and I am not certain, your Honor.

Mr. Strong: We can look at it right now, your Honor.

Mr. Robnett: Under paragraph 4 on page 4 I believe it does, your Honor.

Mr. Strong: Also the top paragraph on page 4, and paragraph 3 itself on that page.

Mr. Robnett: They all raise the point, which is an additional point.

The Court: The memorandum of the trial judge makes no mention except that the motion to dismiss the indictment is denied.

Mr. Strong: I would like to call your Honor's attention to the provision of Statute 145(a) and (b). This is within 145(b).

“Any person who wilfully attempts in any manner to evade or defeat any tax imposed in this chapter.”

In any manner. It doesn't say “in any manner except those provided in 145(a).”

I would also like to state for the record, your Honor, that I don't think that these motions should be brought up time and again, because they have been ruled upon before, and so far we have had three delays in this trial because we get this tandem repetition of motions for bills of particular, to dismiss, over and over again. The motions were made; the record is preserved. If there is any point to it, and if there is a conviction and judgment, it can then be reversed on appeal if it is true that the point is good.

We have had these motions before. This is already the third day, and still we are in the motions, which is simply a repetition under the motion.

The Court: Under the law it is necessary for the defendant, in order to preserve his record at this stage of the proceeding, before the admission of any evidence, to object to the introduction of any evidence on the ground that the indictment doesn't state an offense, for the reason that this

is the only period in the trial where it can be said that the defendant is in jeopardy.

Upon further reading Section 145(a) and 145(b), and the indictment, it is my conclusion that there is not a statement of two offenses, nor is there an attempt to state two offenses; that the only offense stated is an offense under 145(b), which [36] is an attempt to evade or defeat any tax imposed.

It seems to me that that portion of each count beginning with the Arabic numeral 2 in parentheses is surplusage. It is not language taken from any statute. I cannot see how, if this indictment only contained that language, together with the other identifying particulars, it could be held to state an offense under 145(a).

Or to state it another way: that portion of each count beginning with paragraph (2) does not state an offense under 145(a). It is merely descriptive of the offense which is charged, namely, the charge to evade and defeat described by paragraph (b), and being merely descriptive it is surplusage and may be disregarded.

Mr. Robnett: Well, your Honor, you observed the things in (a) more specifically do cover such things as his failure to supply or furnish information.

The Court: That's right. But all they have charged here is a wilful attempt to defeat and evade. This beginning with (2) "by concealing and attempting to conceal from the said collector and any and all proper officers of the United States the true and correct gross and net incomes received

by him during the said calendar year and the sources thereof" is not an offense under subdivision (a).

If that were all that were in this indictment I would be compelled to hold that it did not state an offense under 145, [37] subdivision (a). And it is merely descriptive of the conduct of the defendants which was used and exercised by them in what the government has charged to be the wilful attempt to defeat and evade.

Mr. Robnett: Your Honor, I call your attention to the fact that it is in the conjunctive and therefore it seems to me if it has any proper place in there at all, or performs any function, that it would become necessary for the government to prove not only the one under that paragraph, but also "and by concealing," and so forth.

The Court: The government cannot by describing the conduct of the defendant make that an offense, unless the statute makes it an offense. And the government here by the use of the conjunctive "and," whatever some scrivener of the pleadings might have had in mind, has not succeeded in stating another offense. So that the only offense that is charged is that under 145(b), and that is the only evidence which would be admissible, which is evidence which would go to prove an attempt to defeat and evade, which of course gives considerable latitude to the government and might even include, conceivably, a concealment from officers of the government of the true and correct gross income received.

Mr. Robnett: Then the question of the source——

The Court: If I could read the indictment the way you claim it exists, then I would have to grant your motion. [38] But I cannot read the indictment that way.

In other words, I do not think that there is charged in the single count the two offenses.

Mr. Robnett: Your Honor, I have another objection that I wish to make, but in face of what your Honor has said—as I understand, the government by its opening statement told us what it intends to prove. There has been no statement, if I understand Mr. Strong's statement, that they were going to attempt to prove that anything was kept from the collector or any of the officers of the government under subdivision (b), or that they failed to disclose the sources of income. If that be true, I think they are limited to their statement of what they tell us they are going to prove.

Mr. Strong: No.

The Court: No. The attempt to defeat and evade is language which will permit a very wide latitude, and would include evidence of conduct of the defendants of concealing from officers, if that is part of the evidence that they have. But that only would go to that one offense and wouldn't go to the creation of another and separate offense.

Mr. Robnett: My point being only this, your Honor: that I thought it was their duty to advise us of what they were going to prove, and if they didn't offer to prove anything of that sort, then

we should not be called upon to defend against it.

The Court: I think his statement was sufficiently broad and that it was commendably short.

Mr. Robnett: Yes, indeed. I am not criticizing that at all, your Honor.

Your Honor, I think it would be proper to enlarge my original objection to the exhibits at this time without the jury present, or would I have to wait until the jury comes in? I have an objection that isn't based entirely upon the matters I have just stated.

The Court: Let us take one thing at a time. Your objection to the introduction of any evidence on the ground that the indictment, as supplemented by the bill of particulars, does not state an offense, is overruled.

Mr. Robnett: Very well.

Mr. Katz: May I interrupt? I don't know whether your Honor wants to hear all matters on one motion before going on to another or not. If your Honor does, I would like to——

The Court: Do you have some additional matters on that motion?

Mr. Katz: On the basis of your Honor's ruling there is nothing that I would add to it. On the basis of Mr. Strong's statement, I would like to make the observation to your Honor that, first, 145(a) covers an offense different and separate and distinct from 145(b), and I don't believe that it can at any time be said that the same offenses may be proved as an [40] offense under 145(b), because

I don't believe it is possible for the same offense to be a misdemeanor and a felony at the same time, and as a result of the very same transaction. And if that statement is correct—it doesn't go to your Honor's ruling, it goes to the statements of Mr. Strong—if the statement is correct that the count of the indictment is sufficiently broad to be a statement of an offense under either (a) or (b), then we are confronted with a situation that is in violation of the rules, and as heretofore called to the attention of the court, as appears from the memorandum, a statement of two offenses joined in one count not being separately stated, and of course a statement of two offenses, neither of which defendant may know in advance of trial which it is that the government is going to prove.

Your Honor's ruling has eliminated that possibility, so I have nothing to add on the basis of that. But on the basis of counsel's statement, I would add to the objection.

The Court: Well, Mr. Strong doesn't like it sometimes, but he isn't the one that is making the rulings.

Mr. Strong: That is all right with me always.

The Court: I understand.

Mr. Robnett: Now, your Honor, if I may add specifically to the objection of these exhibits that has been offered——

The Court: In order to keep the record clear, I take it that you, Mr. Katz, were joining in the motion? [41]

Mr. Katz: Yes, your Honor. It is my understanding that that is understood unless one or the other of counsel specifically excludes himself from a given motion or ruling.

The Court: Very well.

Mr. Robnett: I will so understand it in the future, your Honor.

The Court: Very well. The objection to the introduction of any evidence on behalf of both defendants on the ground that the indictment does not state an offense is overruled.

Mr. Robnett: My motion, rather, would be considered as a separate motion to each count, I take it. That is the way I want it.

The Court: As to each part, surely.

Mr. Robnett: As to each count in the indictment.

Now, your Honor, take up the offered exhibits. They are in for identification with numbers.

The Court: 1, 2, 3, 4, 5.

Mr. Robnett: Yes. Taking up No. 1, which appears to be an individual income tax return for 1942, for the calendar year, by Sam Ormont, I wish to object to the introduction of that as not being within the issues in the indictment and the plea of the defendant of not guilty, for the reason that the count it would be under——

The Court: Count 4.

Mr. Robnett: I will have no such objection, I see, as to that one. [42]

My objections rather will be to exhibit for identification No. 3, which is the individual income tax

return for the calendar year 1944 by Sam Ormont. I object to that on the ground that under the only count in the indictment, No. 1, that that would be applicable, if at all—it is not admissible because it is not within the charge in that count for this reason: This return, if your Honor will examine it, is a simple return of ordinary taxes and no Victory tax whatever, yet the charge in the indictment of what this defendant did was that he filed a false and fraudulent income and Victory tax.

The Court: Not in Count 1.

Mr. Strong: Not in Count 1.

Mr. Robnett: Oh, yes, on lines 30 and 31.

The Court: Yes, I see it. It doesn't allege any violation in connection with the Victory tax.

Mr. Strong: May I answer that this way, your Honor: This piece of paper which you have is an income and Victory tax return when it is blank, and the sum that we charge they filed is the sum for income tax. But the document itself is an income and Victory tax return.

Mr. Robnett: They had no such thing as Victory tax in that year, counsel. The Government put out no form on which to file a Victory tax report for 1944.

The Court: Why doesn't the Government furnish legible photostatic copies on white paper? I have said that a thousand [43] times and I am going to keep on saying it.

Mr. Robnett: I will join with you.

Mr. Strong: I shall report the request to the Attorney General, with the usual results, I am afraid.

Mr. Robnett: By comparison of that exhibit with Exhibit 3 I believe it is——

The Court: If you had no Victory tax in 1944, then the word Victory tax is surplusage.

Mr. Robnett: It is the kind of a return, the act, that they have charged us with doing. They have charged us with doing a certain act. That is *how are* charged with our crime, by preparing or causing to be prepared or filing or causing to be filed a certain kind of instrument.

The Court: Where does that say Victory tax? I cannot see it.

Mr. Robnett: It doesn't on the 1944.

The Court: Do you have the originals there, Mr. Strong?

Mr. Strong: Yes, I am getting them out.

Mr. Robnett: If you will look at 1943 return you will see that we had a Victory tax that year.

Mr. Strong: Supposing it is a different kind of form, we don't charge them with filing an improper Victory tax. We are only talking about the amount of money that he reported and the type of tax.

The Court: No. [44]

Mr. Strong: Suppose we call it a piece of yellow paper on which he reported his income tax, and that was within the purview, that he could report it on a yellow piece of paper, would that make any difference?

The Court: Yes, because a yellow piece of paper cannot be used for a return to report your tax on. And you charge him here with willfully preparing

and causing to be prepared and filing and causing to be filed a false and fraudulent income and Victory tax return. Everything else is descriptive. The offense is the filing, as you have alleged it here. Let me read the statute again.

That wouldn't be a ground for objection to the introduction of this document in any event.

Mr. Robnett: I think it is confusing to the jury to allow the document to go in if it doesn't prove anything in the case, and it doesn't prove or tend to prove anything in the case.

The Court: When the evidence is all in there may be a failure of proof. At that time it would seem to me it would be more appropriate to give consideration to your objection.

Mr. Robnett: I want to interpose that objection to that exhibit.

I also want to interpose similar objection to Exhibit 4, which is the United States individual income tax return in 1944 for Phillip Himmelfarb. The reason I am doing that is [45] as you know, my defendant is charged jointly with Mr. Himmelfarb under Count 2.

The Court: That is right.

Mr. Robnett: Therefore I am objecting to that one on the same ground that I have stated for the other one.

I also wish to object upon that ground and upon the further ground that it is hearsay and incompetent, irrelevant and immaterial as to Exhibit 5 for identification, which is being offered, which is the United States individual income tax return for 1944

for Ruth Himmelfarb. There is no charge in the indictment anywhere that Mr. Ormont ever helped prepare or caused to be prepare any return for Ruth Himmelfarb, not within the issues in this case.

The Court: Let me see it.

(The documents referred to were passed to the Court.)

The Court: The objection is overruled as to Exhibits 1, 2, 3 and 4. There is not sufficient foundation to admit Exhibit 5.

Mr. Katz: Your Honor please, before your Honor makes the ruling——

Mr. Strong: May I say something as to 5?

The Court: All right.

Mr. Katz: I want to add to it, but I take it the ruling is a ruling that goes as to both defendants?

The Court: Yes. [46]

Mr. Katz: I wish to add to that, if the Court please, the objection that with respect to the return of Mr. Ormont and the objection I make is of course on behalf of the defendant Himmelfarb, there is no foundation laid for its admission as against the defendant Himmelfarb, it is incompetent, irrelevant and immaterial, and it is hearsay as to him, and there can be no foundation laid for it until such time as it is established by evidence before this court that the defendant Himmelfarb was in some way connected with the document offered.

The Court: I understand your point. That is as to No. 1—well, all those——

Mr. Katz: All of Mr. Ormont's returns.

The Court: All of Mr. Ormont's returns.

Mr. Katz: Yes, your Honor.

The Court: I think that is correct, Mr. Strong.

Mr. Strong: Yes, I think so too.

Mr. Katz: As to the others, the Ruth Himmelfarb return, the objection I make is on behalf of the defendant Phillip Himmelfarb, that there is no reference in any count of the indictment to that in any way, shape, form or manner.

The Court: The allegation in the indictment with relation to Himmelfarb, which is Count 2, is that he made the return on a community property basis. It is conceivable that that document might be admissible, but presently it is not [47] admissible because there is no foundation to show that Ruth Himmelfarb or the Ruth Himmelfarb who made that return is the other portion of the community referred to in the indictment when it refers to Phillip Himmelfarb and his return on a community basis.

Mr. Katz: There is one further fact that I call to your attention in connection with that, and that is this, that the counts specify the returns, specify by whom filed and the amount reported thereon. There is no possible reference by those amounts so limiting the returns referred to and designating the returns that could make the return of Ruth Himmelfarb admissible, and it would only be confusing, even though the return that the defendant Himmelfarb, and that is described, filed on his own behalf is one that is a community return.

The Court: Presently it is not admissible. If subsequently offered when a sufficient foundation is laid, that will be sufficient time to determine whether or not it is admissible as evidence, not of any violation contained in the Ruth Himmelfarb return but of the violations alleged in Count 2 of the indictment.

Mr. Robnett: May I add to my objection to the Himmelfarb returns, to each and all of them, the same objection that counsel has just urged as to the Ormont returns, on the ground that there is no proper foundation laid to correct those returns with my client Mr. Ormont? [48]

The Court: Do you wish to be heard before I rule?

Mr. Strong: Yes, just one point before your Honor decides it, and that is, in the Ruth Himmelfarb return, the name of the person with whom she is filing this one-half community property return is Phillip Himmelfarb, and on Phillip Himmelfarb's return I believe it says——

The Court: Ruth Himmelfarb.

Mr. Strong: ——Ruth Himmelfarb.

The Court: I suppose of the millions of people who file tax returns there might be several Himmelfarbs.

All right. Here is the ruling of the Court on the offer in evidence: On No. 1, 2 and 3 for identification, they are admitted in evidence against Sam Ormont only.

No. 4 is admitted in evidence against Phillip Himmelfarb only.

Otherwise the objections are sustained.

Mr. Strong: May I be heard further on No. 5, because I want to avoid bringing in witnesses if it is not necessary, and I may be able to convince your Honor.

I want to point out——

Mr. Katz: If the Court please, in so far as the necessity for proving the relationship, I will stipulate to that.

Mr. Strong: Then we have no problem.

The Court: You don't have to bring in any witnesses.

You will stipulate that Ruth Himmelfarb is the wife of [49] Phillip Himmelfarb?

Mr. Katz: Yes, your Honor.

The Court: That Ruth Himmelfarb who filed that document is the wife of Phillip Himmelfarb?

Mr. Katz: Yes, your Honor.

The Court: All right.

Mr. Strong: Then there are no problems, your Honor. I offer it again as to of course just the defendant Himmelfarb. I am not offering it as against the defendant Ormont.

The Court: It will be admitted as to Phillip Himmelfarb alone.

Now counsel in their authorities talked about willfulness. I think perhaps I should read to all of you—maybe I have an extra copy here—the instruction which I will give on willfulness, because these cases usually turn on that.

“Willfulness is an element, as I have indicated, in each of the offenses charged in each of the Counts 2 and 3, and it must be estab-

lished by the same degree of proof as any other element of the offense. Under the statute involved in this proceeding—and I propose to read 145(b) to the jury—it is necessary, before you find the defendant guilty as I have indicated, to find that he violated the law willfully. The word ‘willfully’ as used in the indictment and throughout these instructions simply means an intentional conscious doing of the act prohibited, that is, intending the result [50] which actually came to pass without ground for believing that it was lawful, or conduct marked by a careless disregard as to whether it is lawful or not, or deliberate unwillingness to discover and obey the law. Or to express it another way, it means an act done with a bad purpose or with an evil motive to accomplish what the statute prohibits without regard to what the law provides. So that you must come to a conclusion with relation to the element of willfulness beyond a reasonable doubt from all of the facts disclosed by the evidence, taking into consideration the conduct of the parties with relation to the matter charged, and every circumstance which bears upon that issue of willfulness, and when you have considered all of the acts of the parties, their relation to each other, the object to be obtained, the things that were done, the circumstances under which they moved, the motives that prompted the various ones in so far as disclosed from the evidence, and whether the defendant acted in good faith

or not—from all of these you will determine whether or not any act, if done by the defendant, was beyond a reasonable doubt done willfully.”

Now that is the instruction which I propose giving. I will give each one of you a copy of it.

Do you have some more motions?

Mr. Robnett: I believe that is all, your Honor.

The Court: Call the jury down. [51]

(The jury returned to the court room at 2:15 o'clock p.m.)

The Court: The record will show that each of the jurors is present in his or her place and that the defendants are present in person and by counsel.

Proceed.

Mr. Strong: Mr. Allen.

The Court: The documents 1, 2, 3, 4, and 5, offered by the government before recess, ladies and gentlemen of the jury, have been received in evidence as follows:

No. 1 is the income tax return of the defendant Ormont for 1942. It is received in evidence against the defendant Ormont only.

(The document referred to was received in evidence and marked Government's Exhibit No. 1.)

The Court: No. 2 is the income tax return of the defendant Ormont for 1943. It is received in evidence against the defendant Ormont only.

(The document referred to was received in evidence and marked Government's Exhibit No. 2.)

The Court: No. 3 is the income tax return for 1944 for the defendant Sam Ormont, and it is received in evidence against the defendant Ormont only.

(The document referred to was received in evidence and marked Government's Exhibit No. 3.) [52]

The Court: No. 4 is the income tax return of Phillip Himmelfarb for the year 1944 and is received against the defendant Himmelfarb only.

(The document referred to was received in evidence and marked Government's Exhibit No. 4.)

The Court: No. 5 is the income tax return of Ruth Himmelfarb and the parties have stipulated that the Ruth Himmelfarb involved is the wife of Phillip Himmelfarb. It is the income tax return for her for the calendar year 1944 and it is received in evidence against the defendant Phillip Himmelfarb only.

(The document referred to was received in evidence and marked Government's Exhibit No. 5.)

The Court: Swear the witness.

ALBERT D. ALLEN

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Albert D. Allen.

The Clerk: Your address?

The Witness: 601-B East Chevy Chase Drive; Glendale.

* The Clerk: Take the stand.

The Court: Do the parties have any motions concerning the exclusion of witnesses, either one side or the other? [53]

(No response.)

Very well. Proceed.

Direct Examination

By Mr. Strong:

Q. Mr. Allen, what is your occupation?

A. Deputy Collector of Internal Revenue.

Q. What district?

A. Sixth California district.

Q. Where is your place of business?

A. In this building. My office is Room 1121.

Q. How long have you had that position?

A. The way I gave it, 11 and a fraction years.

Q. In connection with your position as Deputy Collector of Internal Revenue here in this district, do you have under your supervision and jurisdiction any of the records, official records, of the Office of the Collector of Internal Revenue showing how

(Testimony of Albert D. Allen.)

much money was paid on the income tax returns that are filed during these years?

A. I have.

Q. Would you please state whether you have examined the records in the office of the Collector of Internal Revenue here to determine how much, if anything, was paid in connection with the income tax reported by the defendant Sam Ormont for the calendar year 1944 and the calendar year 1943 and the calendar year 1942? [54]

A. I have.

Q. Have you done so also with reference to the payment upon the income tax reported by the defendant Phillip Himmelfarb for the calendar year 1944?

A. I have.

Q. Now you have before you there Government's Exhibits I through 4 inclusive, also No. 5. Just look at numbers I through 4, the income tax returns for these persons for the years I have enumerated.

Would you state how much tax was paid by the defendant Sam Ormont in connection with the return for the calendar year 1944?

Mr. Katz: Objected to, if the court please, on the ground that that, as against the defendant Himmelfarb, has no foundation laid and has no bearing on any issue in this case.

The Court: The objection is sustained as to the defendant Himmelfarb.

Mr. Strong: In order to save time, may I say that when I am going to offer testimony with ref-

(Testimony of Albert D. Allen.)

erence to the documents which are signed by the defendant Ormont, that I will only limit the offer to the defendant Ormont until such a time as I say I am offering it as to both; and on the Himmelfarb one, that will be the same. I don't know whether that is satisfactory to counsel or not, but I thought it might [55] save some time.

The Court: I have ruled on this objection.

Mr. Robnett: I want to object on the ground that the records would be the best evidence.

The Court: He has the records before him. He has the exhibits in evidence.

Mr. Robnett: If that is the record of payment, why of course that is all right. I thought they had other books or records because counsel had asked him *if examined* the records of their office to see how much had been paid. I thought they had other books showing payments besides.

The Court: What is the method of keeping books up there?

The Witness: We have other records, your Honor.

The Court: Is that your primary record of payment?

The Witness: Yes, sir.

The Court: Then if there are any additional payments you have other records?

The Witness: Yes, sir.

The Court: You have verified the other records?

The Witness: Yes, sir.

(Testimony of Albert D. Allen.)

The Court: Does there appear to be any payment other than indicated on the return by the other records before that year?

The Witness: I have not checked against this. My [56] records, or the figures are taken from our records in this building, and I have not checked them against the returns before I came here.

The Court: You haven't?

The Witness: No, sir. I mean before I sat in this chair.

Mr. Strong: Check them now.

The Witness: I have caused the records of our office to be checked to see the payments and I have recorded those on a sparate sheet of paper.

Mr. Strong: Let him check them now.

The Witness: But I have not checked that paper against these returns. Shall I do that?

The Court: What was your objection now, Mr. Robnett?

Mr. Robnett: I object on the ground that the records are the best evidence and not the testimony of the witness as to what he thinks they show.

Mr. Strong: It isn't what he thinks they show but what he examined them in his official capacity.

The Court: That is still hearsay.

Mr. Robnett: Yes.

Q. (By Mr. Strong): Do you have the records available now upstairs?

A. If you have plenty of expressmen to bring them down here. [57]

(Testimony of Albert D. Allen.)

Q. Just the records as to these particular individuals in these years. I don't mean all the records for the whole office.

The Court: How do you keep the record up there? Do you keep a ledger page for each taxpayer? The Witness: No, sir.

The Court: How do you keep it?

The Witness: There are 10 on a page.

The Court: 10 on a page?

The Witness: Yes, sir, and it is kept by account members.

The Court: You wouldn't have to bring too many records down here then for these years for these defendants. How big is the page?

The Witness: It isn't a question of a page, sir, it is a question of the size of the books. They can be brought down, I grant you.

The Court: How big are the books?

The Witness (Indicating): That thick, that long, and that wide.

The Court: Counsel's objection is still good. The original records are the best evidence.

Mr. Strong: Would you please go upstairs and bring down the records?

The Witness: Will you furnish someone to go with me? I can't carry those records down here.

Mr. Strong: Will you please go upstairs for the records and I will arrange to get somebody to help you?

The Court: I might suggest, in that connection, that under the statute a certified copy of the record

(Testimony of Albert D. Allen.)

is sufficient, and this witness, however, is not a certifier. All right. Go ahead. Bring your records down.

Mr. Robnett: I will say this to counsel, I don't want to put him to too much work, but if he will submit to me what he claims, we might be able to stipulate.

Mr. Strong: Just a moment.

Mr. Robnett: We might be able to stipulate as to the figures if we can agree upon it.

Mr. Strong: Do you care to look at the returns and see if you can stipulate. That is all we are offering, are the figures on the returns.

The Court: The witness said he checked some other documents and records.

Mr. Strong: The witness also needs help to bring down the voluminous book, so if I may consult with counsel we may not need those voluminous records and then he can stay here.

The Court: If you have another witness, we might put him on the stand now and you can consult at recess.

Mr. Allen, you may be seated there.

(Witness temporarily excused.) [59]

The Court: Call your next witness.

Mr. Strong: Mr. Baizer.

BENJAMIN BAIZER

called as a witness by and behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Benjamin Baizer; B-a-i-z-e-r.

The Clerk: Your address?

The Witness: 1208 South Crescent Heights Boulevard.

The Clerk: Is that in Glendale?

The Witness: That is Los Angeles.

The Clerk: Take the stand.

Direct Examination

By Mr. Strong:

Q. Mr. Baizer, what is your occupation?

A. I am a branch bank manager.

Q. What bank? A. Bank of America.

Q. Where?

A. Brooklyn and Soto branch.

Q. Have you been subpoenaed to produce here certain records of the Bank of America?

A. Yes, I have.

Q. Have you produced those records?

A. Yes, I have. [60]

Q. May I see them, please?

(The documents referred to were passed to counsel.)

Mr. Strong: May I have these six documents marked for identification, please?

The Court: Separately?

Mr. Strong: Yes, your Honor.

(Testimony of Benjamin Baizer.)

The Court: Nos. 7, 8, 9, 10, 11, and 12 for identification.

(The documents referred to were marked Government's Exhibits 7 to 12 inclusive for identification.)

The Court: What do they purport to be, bank slips?

Mr. Strong: No. 7 is a withdrawal slip dated August 28, 1943. I won't mention the sums unless you want it.

No. 8 is a withdrawal slip dated May 25, 1943.

No. 9 is a withdrawal slip dated 8/26/43.

No. 10 is a signature card of Sam Ormont.

No. 11 and No. 12 appear to be the records of the bank showing the withdrawals and deposits and interest in the account of Sam Ormont.

The Court: Very well.

Q. (By Mr. Strong): I show you Government's Exhibits 7, 8, 9, 10, 11, and 12 marked for identification and ask you if you will state whether these are part of the official records kept in the due course of business by the Bank of America from whence [61] you came as you testified.

A. That is correct.

Q. Will you state what records those are?

Mr. Katz: We object to any further questioning along that line with respect to those documents as against the defendant Himmelfarb on the ground that they are incompetent, irrelevant and immaterial, no bearing on any issue in this case, no proper foundation laid, and that they are hearsay.

(Testimony of Benjamin Baizer.)

The Court: Sustained as to the defendant Himmelfarb. Do you remember the question?

Q. (By Mr. Strong): Will you state what those are by number? Take No. 7 first.

A. Shall I specify the amounts too?

Q. Just state what it is in general. They speak for themselves.

A. No. 7 is a savings withdrawal slip. No 8—
The Court: Dated?

The Witness: Dated August 28, 1943.

No. 8 is a savings withdrawal slip dated May 25, 1943.

No. 9 is a savings withdrawal slip dated August 26, 1944.

Q. (By Mr. Strong): As to these three withdrawal slips, you can state [62] whether these amounts were paid to the person who signed them?

A. Yes.

Mr. Robnett: If the court please, I object to them on the ground that they are incompetent, irrelevant and immaterial, and the question propounded, as to the defendant Ormont, as it shows, is that they are merely withdrawals from his savings account and there is no showing that they are income of any kind or character and therefore not within the issues of this case.

The Court: I take it all this is a preliminary matter?

Mr. Strong: Yes. I can't get to the income until I get to the records and if they are kept out we will never get to the income.

(Testimony of Benjamin Baizer.)

The Court: The objection is overruled, the general objection. Let me hear the question again.

(The question referred to was read by the reporter, as set forth above.)

The Court: That is of your own knowledge.

Mr. Katz: If the court please, with respect to the defendant Himmelfarb, to avoid making the objection to each question as it is made, I think some stipulation will probably expedite the matter. I don't want to have to do that.

The Court: If it will be deemed that you have made the objection to all of the questions asked by government counsel [63] without repeating it, and the same ruling made that I have made so far on these objections, unless government counsel avows that the evidence offered is offered also against Himmelfarb.

Mr. Katz: Thank you, your Honor.

The Court: Very well. Now I asked you whether you knew of your own knowledge that it was paid to the person who signed it.

The Witness: I didn't pay him but the staff members of the branch paid him.

The Court: Do you know who signed it?

The Witness: Mr. Ormont signed it, according to his signature card.

The Court: Do you know his signature?

The Witness: Yes, I have his signature card, the original signature card that was taken when the account was opened, and they compare with the savings withdrawal slips.

(Testimony of Benjamin Baizer.)

A. I imagine they would be at the Central Storage vaults. We might be able to get them.

The Court: You wouldn't have them at your branch? [67]

The Witness: No.

Q. (By Mr. Robnett): Did you have these at your branch? A. Yes, sir.

Q. Those two were the only ones you had there?

A. I couldn't answer that. We only looked for the years specified in the subpoena.

Q. I see. That was a subpoena by the government, wasn't it? A. That is correct.

Q. I am going to show you——

The Court: Let's mark it for identification A, photostatic copy of previous ledger sheet, I suppose?

Mr. Robnett: Yes.

(The document referred to was marked Defendant's Exhibit A, for identification.)

Q. (By Mr. Robnett): I want to show you Exhibit A, consisting of six pages photostated, and ask you if you will examine that.

Do you know what that is?

A. It looks like a photostatic copy of the ledger card of the savings account number 747 of Sam Ormont.

Q. That is the same account that you have identified Exhibits 11 and 12?

A. The last two sheets of those photostats are identical with the ones that I brought with me. [68]

(Testimony of Benjamin Baizer.)

Q. And the other sheets precede that, those two sheets which you have just identified, 11 and 12?

A. That is correct.

Mr. Strong: I object to that on the ground the originals are available. I have never seen the originals or the photostats and don't know, as a matter of fact, if those are or are not exact duplicates.

The Court: He is asking the witness. Can you tell whether those are?

The Witness: Yes, I can, because the signature—when the account is opened the signature is usually taken on the signature card and on the ledger card, and on the original ledger card on the first page the signature appears. Then there is a continuation right with the balances from each sheet to the next one.

The Court: So that in the regular course of the business of your bank you could say that that is his complete record of ledger cards?

The Witness: That's right.

The Court: You are entitled to have the originals if you want them.

Mr. Strong: Maybe we can talk it over during recess, because I haven't seen them, and if they are photostats I don't need the originals.

Mr. Kosdon: I will present counsel with a copy.

The Court: He will want to check that copy of the photostats with this copy of the photostats, and then check with the originals. That will make more work.

(Testimony of Benjamin Baizer.)

Mr. Strong: That is what will come from not bringing the originals.

Mr. Robnett: I am going to offer this in evidence, if the court please.

If it is going to become necessary for us to get the originals I want to know it now.

The Court: They may be marked for identification, and I will reserve ruling on the government objection that there is no proper foundation laid until after recess when he may withdraw his objection on that ground.

Mr. Robnett: All right.

The Court: Any further questions of this witness?

Mr. Robnett: No further questions.

The Court: You will remain until after the recess. Next witness.

Mr. Strong: Mr. McClung. [70]

JAMES E. McCLUNG

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: James E. McClung.

The Clerk: Your address?

The Witness: Home address, 1435 West 67th Street, Los Angeles.

(Testimony of James E. McClung.)

Direct Examination

By Mr. Strong:

Q. What is your occupation, sir?

A. I am chief clerk, Security First National Bank, Huntington Park Branch.

Q. Do you have custody of any of the records of the bank?

A. You mean at the bank.

Q. Yes.

A. Well, I can get to them at any time, yes.

Q. They are under your supervision and your direction, the work done under you?

A. Any employee can get to the records. They are filed in our vault.

Q. Have you been subpoenaed to bring here certain records of the bank, Security First National Bank of Los Angeles on Pacific Boulevard? [71]

A. Yes.

The Court: Were you designated and authorized by the bank to produce those records?

The Witness: Yes. The subpoena has my name on it.

Q. (By Mr. Strong): Have you got the records there? A. Yes.

Q. You can put away the subpoena. I won't need that.

Mr. Strong: May I have these documents marked for identification, your Honor? I will try to clip a few together, if possible.

The Court: Has the defendant seen these documents?

(Testimony of James E. McClung.)

Mr. Strong: I have never seen them either. Nobody has.

The Court: All right. We will have a short recess or a recess long enough for the defendants to examine those documents and for you to consult with Mr. Robnett.

Remember the admonition not to discuss this case among yourselves or with any other person, nor to form or express any opinion concerning it until it is finally submitted to you.

(A recess was taken.)

The Court: The record will show each of the jurors present and the defendants present in person and by counsel.

In connection with Mr. Allen's proffered testimony were you able to come to some decision?

Mr. Strong: We have saved the trouble of everybody [72] going upstairs and carrying records now.

Counsel has agreed we can stipulate, subject to correction if there are a few dollars one way or the other, that the income tax paid for the income which was reported on the income tax return, which is in evidence, by Mr. Ormont, for the calendar year 1944, was the sum of \$3625.58. Is that right?

Mr. Robnett: The amount is shown on the return.

The Court: Your stipulation is that the amounts paid are the amounts shown on the returns.

Mr. Robnett: Yes.

(Testimony of James E. McClung.)

Mr. Strong: Yes. And those are the amounts shown in the indictment, is that correct?

Mr. Robnett: Yes.

Mr. Strong: Same stipulation as to Mr. Himmelfarb, the amount of income tax shown as due for the calendar year 1944 shown on the return is the amount paid.

Mr. Katz: The amount paid in connection with that return, so stipulated.

The Court: Mr. Allen may be excused.

Mr. Strong: And that the amount shown on the return of Ruth Himmelfarb to have been paid was the amount which was paid in connection with that return?

Mr. Katz: Yes.

Mr. Robnett: We are not bound by their stipulation on [73] those things. We are not stipulating to that, because we know nothing about it.

Mr. Strong: I understand that. I think the record is clear.

The Court: At the present time these are admitted only as against the respective defendants as heretofore indicated. In the event they are connected, however, I don't think that the government should be put to the trouble of reproving something that is stipulated to.

Mr. Katz: No, your Honor, that is not the purpose, nor the intention, but the thing we have in mind is this: that each defendant presently makes a stipulation for himself. Because until such time as it is proven otherwise we are not in a position to do anything else.

The Court: Very well.

(Testimony of James E. McClung.)

Mr. Strong: May we have that understanding with respect to the defendant Sam Ormont? Is that right?

Mr. Robnett: That is correct.

The Court: That is the ruling that the court has made. They are now admissible as against the respective defendants that have been heretofore indicated, which I won't repeat.

Mr. Baizer, you had some matters concerning him, and he might wish to be excused.

Mr. Strong: He is working on something and he doesn't mind staying a few minutes. May we proceed with this witness? [74]

The Court: All right.

Q. (By Mr. Strong): Are these the records you produced pursuant to a subpoena?

A. That's right.

The Court: Counsel will excuse me for a few moments. We will have a short recess. You may remain in your seats.

(A short recess was taken.) [75]

The Court: The jury is present, also the defendants and their counsel. Proceed.

Q. (My Mr. Strong): I show you Government's Exhibits 13, 14 and 15 for identification, and ask you whether these are the official records of the Security First National Bank, Huntington Park Branch, which you were subpoenaed to produce here.

A. (Examining documents) That is right.

Q. Would you state briefly what they are, taking them by number?

(Testimony of James E. McClung.)

A. No. 13 is the original signature card on this account in the name of Sam Ormont. The record here shows it was opened in 1932.

No. 14 is 13 original deposits. Do you wish the amounts on each one of them?

Q. No; just deposits slips?

A. Original deposit tickets, yes, made out in Sam Ormont's writing.

Q. And those deposit tickets represent deposits made in the due course of business of your bank?

A. That is right.

Q. Go ahead.

A. Then we have five original full ledger sheets, commercial account, in the name of Sam Ormont for the period asked for in the subpoena. [76]

Q. You mean there are some more cards?

The Court: What period is that?

The Witness: For 1942, '43, '44 and January of '45.

The Court: Very well.

Q. (By Mr. Strong): I show you this document which is marked Government's Exhibit No. 20, is that one of the records too?

A. That is right.

The Court: Government's Exhibit 20?

Mr. Strong: For identification.

The Court: How did you get from 15 to 20?

Mr. Strong: We marked a number of them during the recess for purposes of identification.

The Court: Very well.

(Testimony of James E. McClung.)

The Witness: This is the original deposit ticket on account No. 224808, in the name of Sam Ormont, dated May 1, 1942.

Q. (By Mr. Strong): Were the deposits made as shown in the due course of business at your bank?

A. Yes. That is the original record.

Q. Here is Government's Exhibit 19. State what that is.

A. That is a withdrawal ticket on the same savings account signed by Sam Ormont dated July 17, 1943. It is the original record. It is the only record. [77]

Q. So far as you know, the withdrawal was or was not made?

A. It was made; yes. I have the ledger card here to show.

Q. Government's Exhibit 18?

A. This is a withdrawal ticket on the same account, dated January 10, '42. It is an original. It is cancelled.

Q. Was that withdrawal made also as shown by the document itself? A. That is right.

Q. This is 17 and 16, are they part of your records?

A. Yes. Here is the savings account signature card on the account, opened January of 1937.

Q. Whose account?

A. Sam Ormont. It is the original. It is the only signature card we have on that.

No. 16 is the original savings ledger card to which all withdrawals and deposits are posted. It is the

(Testimony of James E. McClung.)

original of account 224808, Sam Ormont, and shows all the withdrawals and deposits.

Q. These are the only documents you were subpoenaed to produce, is that right?

A. I believe that's it. I have not checked them to see. That is all I brought; yes.

Mr. Strong: That is all. [78]

The Court: Cross-examine?

Mr. Robnett: Yes, your Honor.

Cross-Examination

By Mr. Robnett:

Q. Let me understand your name again, please.

A. McClung; James E. McClung.

Q. Mr. McClung, I am going to show you first Exhibits 13, 14 and 15 for identification, I guess they are—I don't believe they have been offered in evidence?

The Court: No, they haven't been offered in evidence.

Q. (By Mr. Robnett): I ask you if that is the complete bank record of that account of Sam Ormont from the beginning to the end.

A. It calls here in your subpoena for a set date.

Q. No, I am asking you a question. That isn't my subpoena.

A. Let me look at it first. I don't know when it was opened. Yes, I do. Do you have the commercial signature card here?

(The document referred to was passed to the witness.)

(Testimony of James E. McClung.)

The Witness: March 15, 1932.

Q. (By Mr. Robnett): That is when it was opened?

A. That is right. And this only goes back to '41.

Q. Could you produce at the next hearing of the court [79] the entire record of that account in connection with this same ledger?

A. Yes, in about five days.

Q. About five days? A. Yes.

The Court: Why five days.

The Witness: Well, we have to order them through our warehouse. The normal procedure takes about five days.

The Court: Couldn't you hasten them a little bit?

The Witness: I haven't gone out to the warehouse and dug them out myself, I wouldn't know where to find them, but I guess it could be done if you insist on it. [80]

Q. (By Mr. Robnett): May I ask you is it a question of time in finding them? Are they mixed up?

A. No. We keep our records, we have our regular channels through which we order them. We fill out a requisition and send it in, and they look them up and send them back to us. In fact, I ordered some of these from the warehouse. We only keep current records out at the branch, back about two years. We don't have room out there to carry them all.

(Testimony of James E. McClung.)

Q. Will you kindly order those, rush order, when you return to the bank, please?

A. Yes.

The Court: If you desire them, I will direct the witness to produce them. They won't be needed before probably Wednesday morning, next Wednesday morning.

Mr. Robnett: Yes.

The Court: That will be time enough.

Mr. Robnett: Will you return with them at that time, then?

The Witness: Yes.

The Court: You understand now what you are to produce? The entire ledger records.

The Witness: That is just on his commercial account?

Mr. Robnett: I am going to ask him the same on the other accounts. I think maybe you have it here.

The Witness: I believe we have on that account.

Mr. Robnett: Isn't that when it was opened?

Mr. Kosdon: May I interrupt for a minute? Mr. Robnett, will you have the witness also bring in the ledger cards pertaining to the Acme Meat Company?

The Court: Are they kept there? Do you recall that account?

The Witness: Yes.

The Court: All right. The complete ledger cards of the Acme Meat Company; commercial and savings?

Mr. Kosdon: Just commercial.

(Testimony of James E. McClung.)

The Court: Since the time it was opened up to date.

Mr. Robnett: And of each of these accounts (indicating), both the commercial and the savings.

The Witness: That is next Wednesday morning at 10:00 o'clock.

The Court: Yes.

Q. (By Mr. Robnett): By the way, this account, Exhibit 16, is that the savings account?

A. That's right.

Q. Is that the complete savings account until it was closed up?

A. Well, now, I brought the ledger cards showing all the entries, the signature card, that is the only one; but I have not brought all of the deposits since the account opened. In fact, that goes back to 1937. [82]

Q. You mean you have not brought the deposit slips? A. No, not for 1937.

The Court: He brought the ledger, didn't he? You have the ledger account since '37? The ledger account is what you want?

Mr. Robnett: It seems to be of value to us to have the deposit slips, if he could bring them.

The Court: That is the savings account only you want the deposit slips?

Mr. Robnett: Yes. He has the ledger sheet here. This ledger sheet is closed out.

The Court: What do you want of the Acme Meat Company? Just the ledger sheet?

(Testimony of James E. McClung.)

Mr. Robnett: I want everything pertaining to the account, ledger sheets and the deposit slips.

The Court: Ledger sheet, signature card and the deposit slips for the Acme Meat Company?

Mr. Robnett: Yes.

The Witness: They may have, maybe, a deposit of two a day for seven years, and that is a job. If they have to have them, I can get them. If they don't have to have them, it is a tremendous job. You go in a warehouse, you pick out a group of deposit tickets and take one out and put the rest back, for seven years, that is a job, believe me.

The Court: A savings account is not so bad?

The Witness: It is the same way, your Honor. They are filed day by day.

The Court: There are not so many deposits?

The Witness: About 20 on that card covering from '37 up to '43. I know the bank will take the responsibility that these original debits are posted to the correct account.

Mr. Robnett: As to the Acme Meat Company, since there are so many deposit slips you don't need to bring them.

The Witness: I am to bring the entire ledger and signature card on Acme Meat, and on this account here back to where the account opened?

The Court: The commercial account.

The Witness: Yes.

The Court: They want the deposit slips on the savings account.

Mr. Robnett: Yes, correct.

(Testimony of James E. McClung.)

The Witness: Yes, back to '37.

The Court: To the time it began.

Cross-examination?

Mr. Katz: No, your Honor. My understanding is that all of this testimony was going in, until it is changed, was going in as against the other defendant.

The Court: That is right. The witness may be excused to return next Wednesday at 10:00 o'clock.

Mr. Strong: Surely. [84]

The Court: Next witness.

Mr. Strong: Mr. Jehl.

ALBERT H. JEHL

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Albert H. Jehl.

The Clerk: Your address?

The Witness: 4808 Victoria Avenue, Los Angeles.

Direct Examination

By Mr. Strong:

Q. Mr. Jehl, what is your occupation?

A. Junior vice-president and manager of the Citizens National Trust and Savings Bank.

Q. Have you produced with you here today, pursuant to subpoena directed to the Citizens Na-

(Testimony of Albert H. Jehl.)

tional Trust and Savings Association, certain documents of the bank, books and record?

A. I have.

Q. Do you have them there? A. I have.

Q. Will you look at those documents before you and state whether they are part of the official records of the bank kept in the due course of business?

A. They are.

Q. Those are Government's Exhibits, for identification, [85] Nos. 21, 22, 23 and 24, is that right?

A. That's right.

Q. Will you kindly state what No. 21 is?

A. 21——

The Court: Have you seen these?

Mr. Kosdon: I don't think so.

Mr. Strong: Yes, these are the ones I have shown them before.

Mr. Robnett: All right. If he says we have seen them, I guess we have.

Mr. Strong: That is what they were looking at.

The Witness: This is the signature card of the Acme Meat Company showing Sam Ormont as sole owner, together with a sole ownership certificate of business being carried on under the fictitious name of Acme Meat Company, executed by Sam Ormont. Card dated 4/16/1943, the date of opening. Showing closed out as of February 10, 1947.

Another signature card of the Acme Meat Company, this is No. 22, Acme Meat Company payroll account, executed by Sam Ormont, dated March 3, 1945, and showing as closed out March 10, 1947.

(Testimony of Albert H. Jehl.)

No. 23 is commercial deposit slips as of May 21, 1943, October 9, 1943, January 25, 1944, March 29, 1944, May 25, 1944, June 3, 1944, June 10, 1944, June 28, 1944, July 12, 1944, September 23, 1944, November 11, 1944; all in the name of Acme Meat Company.

Q. Those are deposit slips?

A. Those are commercial deposit slips.

Q. Do you know if the deposits were made as shown? A. That is right.

The Court: In the regular and usual course of business, deposits would have been made as reflected by those accounts?

The Witness: That is right, sir.

Exhibit 24 are commercial ledger sheets of the Acme Meat Company, starting with an opening of April 16, 1943, and running through those years to December 29, 1944.

The Court: Was the account closed at that time?

The Witness: No, sir. The account was closed on February 10, 1947.

Mr. Strong: That is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Robnett:

Q. Is that the complete record of that account from the beginning to the end?

A. From the beginning until December of 1944.

Q. Q. Is that when it was closed out? [87]

A. No, it wasn't closed until February of 1947.

(Testimony of Albert H. Jehl.)

Q. Then there are——

A. Those are the dates that the government subpoenaed, however.

Q. Yes. In any event, if we should want the other sheets up to date, would it take you very long to get them? I don't know that we do.

A. The sheets wouldn't take long no, but the deposit slips would be a lot of trouble. But we have the sheets at the branch.

Q. We could telephone you and get them?

A. Any time; yes, sir.

Mr. Robnett: That is all.

Mr. Strong: Just one more question.

Redirect Examination

By Mr. Strong:

Q. Did you bring the loan liability ledger sheets for the years 1942, '43 and '44?

A. There are none.

Q. There are none? A. None.

Q. Did you have any applications for loans and financial statements submitted by Sam Ormont or Phillip Himmelfarb? [88]

A. No, we did not.

Q. That is the reason you didn't bring them?

A. That is right.

Mr. Strong: That is all.

The Court: You may be excused.

(Witness excused.)

The Court: Next witness.

Mr. Strong: Mr. Pingree.

HUGH R. PINGREE

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

Mr. Strong: May I call another witness before this one so that these documents can be marked?

The Court: Let's get the witnesses sworn first.

The Clerk: Your name?

The Witness: Hugh R. Pingree; P-i-n-g-r-e-e.

The Clerk: Your address?

The Witness: 3117 Via Breve, Montebello.

The Court: You may step down for a moment.

We are going to recess today at 4:00 o'clock so if you have any more of these record witnesses you better get them first.

Mr. Strong: That is what we are doing so that they can go home. [89]

Mr. Miller.

THOMAS G. MILLER

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: May I have your name?

The Witness: Thomas G. Miller.

The Clerk: Your address?

The Witness: 126 South Primrose Avenue, Alhambra.

Direct Examination:

By Mr. Strong:

Q. What is your occupation, sir?

(Testimony of Thomas G. Miller.)

A. Office manager of Merrill, Lynch, Pierce, Fenner & Beane, members of the New York Stock Exchange.

The Court: What was that name?

The Witness: Merrill, Lynch, Pierce, Fenner & Beans, know as "We, the People."

The Court: We, the People?

The Witness: Yes, your Honor.

Q. (By Mr. Strong): Have you been subpoenaed or has Merrill, Lynch, Fenner and Beane been subpoenaed to produce certain documents which you brought with you here today?

A. Yes, we have.

Q. I will show you this group of documents that we [90] have already marked for identification and ask you whether these are the documents which you have brought pursuant to the government's subpoena.

The Court: Their numbers?

Mr. Strong: Nos. 26 through 31 inclusive for identification.

The Witness: (Examining documents) Yes, they are Mr. Strong.

The Court: The defendants have seen these?

Mr. Kosdon: We have looked at them.

Q. (By Mr. Strong): Would you take them one by one and state very briefly what they are.

A. Exhibit 26 is the ledger record of the account of Sam Ormont from January 1, 1941, through May 31, 1941.

(Testimony of Thomas G. Miller.)

Exhibit 27 is the ledger page representing the account of Sam Ormont from June 28, 1941, through December 31, 1941.

Exhibit 28 is the ledger record of Sam Ormont from January 1, 1942, through December 31, 1942.

Exhibit 20 is the ledger record of the account of Sam Ormont from February 2, 1943, through December 31, 1943.

Exhibit 30 is the record of January, 1945 and February, 1945 of Sam Ormont.

Exhibit 31 is the ledger record of the account of Sam Ormont from January 1944 through December 1944. [91]

Q. Those are the records kept by your concern in the due course of transacting their business?

A. Yes, they are.

Q. I show you Government's Exhibit 25 for identification and ask you if this is a photostatic copy which you have brought with you here today pursuant to the subpoena.

A. Yes, that is correct.

Mr. Strong: Will counsel stipulate that we can use this photostat in lieu of the original card, that is, Government's Exhibit 25 for identification, the signature card?

Mr. Robnett: Yes.

The Court: What is it?

Mr. Katz: That is a matter I am not concerned with, but it is still my understanding that until such time as you indicate that you are proceeding against

(Testimony of Thomas G. Miller.)

the defendant Himmelfarb you are proceeding against the defendant Sam Ormont.

Mr. Strong: Yes.

Q. Would you state what that is first.

A. This is the signature card and account card of Sam S. Ormont signed January 2, 1941.

Mr. Strong: I am simply asking, with reference to the use of the photostat rather than the original so that in the event I offer it as against the defendant Himmelfarb that we don't have to go running around to get the original.

Mr. Katz: That is so stipulated. That is satisfactory, [92] if it ever comes in against the defendant Himmelfarb the use of a photostate will be satisfactory.

Mr. Strong: Thank you. That is all.

The Court: Any cross-examination?

Mr. Robnett: No questions.

Mr. Katz: No, your Honor.

The Court: You are excused:

(Witness excused.) [93]

The Court: Do you want Mr. Pingree back on the stand?

Mr. Strong: Please.

HUGH R. PINGREE

called as a witness by and in behalf of the government, having been previously duly sworn, was examined and testified as follows:

The Court: You were sworn a moment ago?

The Witness: Yes.

(Testimony of Hugh R. Pingree.)

Mr. Strong: May I in the meanwhile pass these exhibits 1, 2, 3 and 4 in evidence, to the jury while we are putting these other documents in?

The Court: No:

Direct Examination

By Mr. Strong:

Q. Mr. Pingree, what is your occupation?

A. I am manager, Bank of America, First and Chicago Branch, Los Angeles.

Q. Have you pursuant to a subpoena issued directed to the Bank of America at your branch brought certain records with you of the Bank of America? A. I have.

Q. I show you these documents, Government's Exhibits 32 through 36 for identification and ask you whether these are the records which you have brought with you.

A. That is correct. Of course those are copies of the [94] original that I brought also.

The Court: Those are photostats?

The Witness: Yes.

Mr. Strong: The witness is referring to Government's Exhibits 32, 33, 34 and 35. The originals are in the courtroom and I understand from counsel that we may use in this case the photostats in lieu of the originals. Is that correct?

Mr. Katz: Now I think you are proceeding on matters as against the defendant Himmelfarb, is that correct?

Mr. Strong: That is right.

(Testimony of Hugh R. Pingree.)

Mr. Katz: The use of photostats is satisfactory. There is no objection.

The Court: As to these matters?

Mr. Strong: As to these exhibits?

Mr. Katz: Yes, as to these exhibits that we are referring to.

Mr. Robnett: I won't object on the ground that they are photostats. You are not offering them as against my client now, are you?

Mr. Strong: I am not offering them now.

Mr. Robnett: Will this examination pertain to my client?

Mr. Strong: No, it is just pertaining to the documents. But I understand that in any event, if we do offer them you will not object on the ground that they are photostats?

Mr. Robnett: Not at all. [95]

Mr. Strong: Thank you.

The Court: Let me see, you haven't offered in evidence Exhibits Nos. 7 to 31 yet.

Mr. Strong: I have not offered anything beyond Exhibit 5.

The Court: In view of the fact that you are moving over to a different defendant, should you not make your offer at this time?

Mr. Strong: I will offer them in evidence. I offer in evidence Government's Exhibits 6 through 36 inclusive.

The Court: Nos 6 to 31, because these others involve something else.

Mr. Robnett: Pardon me just a moment.

(Conference between counsel.)

(Testimony of Hugh R. Pingree.)

Mr. Strong: And at this time I am offering them only as against the defendant whose account it is.

The Court: Sam Ormont?

Mr. Strong: Yes.

Mr. Robnett: How many are you offering?

The Court: Nos. 7 to 31 inclusive.

Mr. Robnett: As to 26 to 31 inclusive that have just been identified there by the witness, as to those I interpose an objection on the ground that they are incompetent, irrelevant and immaterial, do not tend to prove any issues in this case to show any taxable income during any period or time. [96]

As to the others, I believe they are all bank records, practically all, and they only show bank accounts, and I want to interpose the formal objection that they do not show any taxable income.

The Court: That they are incompetent, irrelevant and immaterial?

Mr. Robnett: That they are incompetent, irrelevant and immaterial for that reason, unless they are connected up and shown to be income.

The Court: They will be admitted subject to the motion to strike in the event they are not connected up, and admitted only as against the defendant Sam Ormont and not as against the defendant Phillip Himmelfarb.

(The documents referred to were received in evidence and marked Government's Exhibits 7 to 31 inclusive.)

Mr. Strong: No. 6 is still here. I haven't offered it yet.

(Testimony of Hugh R. Pingree.)

The Court: I don't know what No. 6 is.

Mr. Strong: No. 6 is an income tax return. I will offer it in evidence just to keep this whole thing so we won't have to go looking for No. 6 later on.

Mr. Robnett: May I see whose it is?

(Counsel exhibiting document.)

Mr. Strong: I offer 6 with everyone's acquiescence. [97]

(The document referred to was received in evidence and marked Government's Exhibit No. 6.)

Q. (By Mr. Strong): Now, Mr. Pingree, would you please state briefly what these are by number?

A. Exhibit 32 is a photostate of the original signature card covering the commercial account of Phillip Himmelfarab opened on May 14 of '42.

Exhibit 35 is a photostatic copy of cashier's check No. 3305484, dated January 20, '45, payable to Acme Meat Company in the amount of \$3150.

Q. Was this paid, as far as you know?

A. Yes, showing it was paid on May 24 of '45.

Mr. Katz: If the Court please, I am going to move to strike the statement of the witness with respect to what the document shows. The document is the best evidence of what it shows, and I am going to move to strike it upon the further ground that it is in a date subsequent to the time that is here involved for the present purposes at least until such time as a later date is brought into issue. [98]

The Court: That is Exhibit 32?

Mr. Strong: That is the check, 32.

(Testimony of Hugh R. Pingree.)

The Witness: 35, isn't it?

Mr. Strong: We will connect it up, your Honor.

The Court: Let me see it.

(Document handed to the court.)

The Court: You mean 32, 33 and 34 have something to do with this?

Mr. Strong: I don't understand you.

The Court: You said you would connect it up.

Mr. Strong: 35. All the others have something to do with it.

The Court: Will you connect 32, 33 and 34 with 35?

Mr. Strong: Yes.

The Court: Then let's start with 32, 33 and 34.

The Witness: That was out of order. I didn't notice it.

The Court: I will reserve ruling on the objection.

Mr. Strong: As to which one? Just the one, 35?

The Court: That is the only one that the objection has been made on so far.

Q. (By Mr. Strong:) Go ahead.

The Court: Tell us what 32, 33, 34 and 35 and 36 are. What are they?

The Witness: I have told you on 32. Should I repeat? [99]

The Court: I missed it.

The Witness: That is a photostatic copy of a signature card executed by Himmelfarb, Commercial Account, showing the opening date May 14 of '42. That is Exhibit 32.

(Testimony of Hugh R. Pingree.)

The Court: Very well.

The Witness: Exhibit 33 is a photostatic copy of a commercial deposit dated May 26 of '45.

Mr. Katz: Just a minute. If the court please, I am going to object to any further statement with reference to a matter that is dated beyond the year that is before this court in this matter. It is not in the issue. The record is, in any event, the best evidence of what it contains.

Mr. Strong: We will tie it up, your Honor.

The Court: Finish your statement. Dated when?

The Witness: May 26, 1945.

The Court: All right. I will reserve ruling on that.

The Witness: Exhibit 34 is a photostatic copy of an original application for cashier's check No. 5484, dated—the date of this particular document January 20 of '45. Check payable to the Acme Meat Company.

Mr. Katz: Just a minute. If the court please, I am going to make the same objection with respect to that document, which is passing beyond the date that is here before the court.

Mr. Strong: We will connect it up, your Honor.

Mr. Katz: On the same ground, the record is the best evidence.

The Court: I will reserve ruling on it. Continue. 35 is the cashier's check what date?

The Witness: January 20, 1945.

The Court: What is 36?

(Testimony of Hugh R. Pingree.)

The Witness: 36 are certain copies of the ledger sheets of Phillip Himmelfarb, covering the periods from December 24, 1943 to and including January 23 of 1946.

Mr. Katz: Same objection, if the court please, with reference to the ledger cards at this time, and until the later dates are placed in issue, with respect to a date beyond the end of the year '44.

The Court: Are you offering this in evidence?

Mr. Strong: I am offering all of them, your Honor.

The Court: 32 is admitted in evidence; 33 is admitted in evidence; 34 is admitted in evidence; 35 is admitted in evidence; 36 is admitted in evidence in so far as the date of March 15, 1945 is concerned. Beyond that date it will be marked for identification until further foundation is laid.

Cross-examination?

I take it you are through?

Mr. Strong: Yes. I just have these documents.

Cross-Examination

By Mr. Katz:

Q. Mr. Pingree, with reference to Exhibit 36, that account, as I understand it, was opened in the year 1942, is that correct?

A. That's correct.

Q. And the ledger sheets that you have, do they commence as of the date of the opening of that account?

A. No; they commence as of December 24 of '43.

(Testimony of Hugh R. Pingree.)

Q. If the request is made of you to produce the ledger sheets from the date of the opening of the account to the date at which these ledger sheets begin, can you do that?

A. Yes, we can do that. It would be a matter of about six months, approximately, we could do that in a short time.

Q. When you say "six" months you mean you are talking about it covers a six months period and you can do it quickly?

A. Yes.

Q. It wouldn't take you six months to get those records together?

A. No, that's right.

Q. Will you make those available to us?

A. Yes.

The Court: On order of the court I take it you would?

The Witness: Yes.

The Court: When do you want him back—next Wednesday at 10:00 o'clock?

Mr. Katz: I don't believe I will need him before that time, your Honor.

The Court: Very well. Next Wednesday at 10:00 o'clock you come back with those additional records. In the meantime you may be excused.

Any other witnesses this afternoon?

Mr. Strong: Are there any other witnesses with records? That will be all this afternoon.

The Court: You mean with bank records.

Mr. Strong: Any other kind of records. I don't mean criminal records.

The Court: Very well.

(Testimony of Hugh R. Pingree.)

I think we can proceed with this matter Monday afternoon. Monday morning is law and motion day. I will be through by noon.

Recess until 2:00 o'clock Monday afternoon. You remember the admonition, and all witnesses are directed to return to this court room on that date and hour.

(Whereupon, at 4:00 o'clock p.m., Friday, May 23, 1947, an adjournment was taken until Monday, May 26, 1947, at 2:00 o'clock p.m.)

Los Angeles, California, May 26, 1947
2:00 o'clock P.M.

The Court: Ex parte?

The Clerk: I believe not, your Honor.

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated, your Honor.

Mr. Robnett: Yes.

Mr. Strong: That the jury is present and the defendants are in court.

The Court: Call your witness:

Mr. Strong: Mr. Baizer.

BENJAMIN BAIZER

recalled as a witness by and in behalf of the Government, having been previously duly sworn, was examined and testified as follows:

The Clerk: You have been sworn before?

The Witness: Yes.

(Testimony of Mr. Baizer.)

The Clerk: And your name again?

The Witness: Benjamin Baizer, B-a-i-z-e-r.

Direct Examination

By Mr. Strong:

Q. Mr. Baizer, you were a witness in this case before and you were sworn?

A. That is correct. [107]

Q. You were asked to bring certain additional records of the bank?

A. I have them here.

Q. May I have them, please?

A. (Producing documents) Those are the originals.

Mr. Strong: May I have this group of documents marked as one exhibit for identification, your Honor?

The Clerk. No. 37.

(The documents referred to were marked Government's Exhibit No. 37 for identification.)

Mr. Strong: I will show them to the defendants, your Honor.

(Exhibiting documents to counsel.)

Q. (By Mr. Strong): I show you Government's Exhibit 37 for identification. Will you please state what these are?

A. These are savings deposit tickets to the savings account of Sam Ormont, No. 747. One of them is dated February 4, 1942, in the amount of \$550—

(Testimony of Mr. Baizer.)

Q. Whatever they show on their face. They are savings deposit tickets?

A. That is right.

Q. For the savings account?

A. Savings deposit tickets to the account.

Mr. Katz: If the Court please, at this time I wish to [108] renew the objection heretofore made, and I would like, if possible, to have the same understanding.

Mr. Strong: Same understanding.

Mr. Katz: That is, that these matters are inadmissible as against the defendant Himmelfarb, and it will be understood that the objection made to each question and the ruling of the Court be the same as against each question and each witness until Mr. Strong indicates that he is proceeding against the defendant Himmelfarb.

The Court: I doubt if the Government would be willing to concede an understanding to that effect, but I think that they would concede an understanding to the effect that that is the basis of your objection.

Mr. Katz: Yes, your Honor.

The Court: And that I will make the same ruling.

Mr. Strong: That is right.

The Court: All right.

Mr. Katz: Thank you.

Q. (By Mr. Strong): Now do you know whether the deposits in the sums indicated by those slips were actually made?

A. Yes, they were.

(Testimony of Mr. Baizer.)

Mr. Strong: I offer these documents in evidence, your Honor.

Mr. Robnett: Our objection to those is that they are incompetent, irrelevant and immaterial at this time unless they are connected up and shown to be income.

The Court: Overruled. Admitted as to Sam Ormont only.

(The documents referred to were received in evidence and marked Government's Exhibit No. 37.)

Mr. Strong: No further questions.

The Court: Any questions?

Mr. Robnett: No questions.

The Court: This witness was going to produce some other documents.

Mr. Strong: That was Wednesday.

The Witness: Not me. I think you are referring to Mr. Pingree.

Mr. Strong: Some of the bankers who were here said that they would bring the documents requested by the defendants on Wednesday.

The Court: Your ledger sheets were from the opening of the account?

The Witness: No, your Honor, just from 1942 on. They were not requested.

The Court: They wanted them from the opening of the account.

(Testimony of Mr. Baizer.)

Mr. Robnett: Your Honor, I believe that the record will show that I have an exhibit which is a photostatic copy which the witness testified to.

The Court: And that it was correct. [110]

Mr. Robnett: And I am going to ask counsel for the prosecution at this time, while the witness is still here, if he is still going to raise the objection that they are purely photostats.

Mr. Strong: No, I will take Mr. Robnett's word that these are representative.

The Court: The witness testified that they were true copies.

Mr. Robnett: That is correct, but there was an objection before that they were not the originals.

The Court: The witness may be excused then.

(Witness excused.)

Mr. Robnett: I offer these in evidence at this time. That will be Defendants' Exhibit A.

The Court: As part of the cross examination?

Mr. Robnett: Yes. I cross examined him the other day.

The Court: Very well. They are admitted in evidence as part of the cross examination of the witness Baizer.

(The documents referred to were received in evidence and marked Defendants' Exhibit A.) [111]

ERNEST LINK

a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name for the record?

The Witness: Ernest Link.

The Clerk: What is your address, Mr. Link?

The Witness: 333 South Hope Street.

Direct Examination

By Mr. Strong:

Q. Mr. Link, are you acquainted with the defendant Sam Ormont? A. Yes, I am.

A. Are you acquainted with the defendant Phillip Himmelfarb? A. Yes.

Q. How long have you known Mr. Ormont?

A. Since 1931.

Q. And Mr. Himmelfarb?

A. Since 1944.

Q. Were you employed in any business capacity with Mr. Ormont?

A. I was his bookkeeper.

Q. When? A. From 1931 until 1945.

Q. When in 1945? [112]

A. Until the middle of April, 1945.

Q. Would you state what your duties were with reference to your being bookkeeper for Mr. Ormont?

A. I was in full charge of his books. That included checking his bills, entering bills, sending out statements, and making monthly profit and loss calculations.

(Testimony of Ernest Link.)

Q. That was during what period?

A. During all of that period from 1931 until 1945.

Q. During that period, so far as you know, what business was Mr. Ormont engaged in?

A. In the buying of livestock, slaughtering of livestock and selling meat products from the slaughterhouse, livestock.

Q. Was there a firm name under which Mr. Ormont operated.

A. Yes, it was known as the Acme Meat Company.

Q. Was this in that period from 1931 to 1945?

A. Yes.

Q. You were employed in the office then of this Acme Meat Company?

A. It was only a spare time job. I would do that at home.

Q. But you had the full duties of a bookkeeper on his books? A. Yes. [113]

Q. With reference to purchases, what sort of entries did you make in that connection?

A. Those entries for purchases were made solely from the check record. That is, the checks would be made out by Mr. Ormont. I would enter them through my check records, and charge them to purchases.

Q. You are talking about purchases by Mr. Ormont?

A. By Mr. Ormont, or whoever was his partner. There was at one time a Mr. Salter.

(Testimony of Ernest Link.)

Q. In other words, purchases by the Acme Meat Company?

A. Purchases by the Acme Meat Company.

Q. And sales made by the Acme Meat Company, —what sort of records, what sort of entries did you make?

A. I would enter sales in the sales record from the bills made out by Mr. Ormont, and they would be entered in their accounts receivable record, and statements would be made and sent to the customers.

Q. Did you prepare a set of books for Mr. Ormont, or did you find a set of books already in existence?

A. No, I started the first set of books for him.

Q. That was in 1931? A. Yes.

Q. Was there anybody else, so far as you know, who had anything to do with making bookkeeping entries in those books?

A. Only during vacation periods. [114]

Q. That's about how long a period during a given year?

A. There was one time, a period perhaps five or six months or seven months.

Q. When was that? A. 1939.

Q. And 1942, 1943 and 1944?

A. I was keeping the books.

Q. Did you have any assistance? A. No.

Q. You did all the work yourself?

A. Yes.

Q. Making the entries as to the sales by the Acme Meat Company, did you have access to the invoices?

(Testimony of Ernest Link.)

A. Yes, I checked the invoices. I checked all the extensions and the additions before I would enter them into the customer's accounts.

Q. Did you make the invoices?

A. No, I only checked the invoices.

Q. The record, the data on the invoices onto the books?

A. From the invoices into the books.

Q. Did you make any kind of a distinguishing mark on those invoices after you got through with each one?

A. Yes, I have a steady habit of making check marks on all the extensions I check.

Q. What was the purpose of that? [115]

A. To know that I checked them, and they were correct.

Q. So by examining an invoice you can tell, can you not, whether or not you had used that to make an entry into the books? A. Yes.

Q. Invoices which do not bear your check marks, I understand were not entered by you?

A. That is correct.

Q. Do you have the books for the Acme Meat Company for the year 1942, 1943 and 1943.

A. Do I have them?

Q. Yes. A. I had them.

Q. Do you have them now? A. No.

Q. Do you have access to them now?

A. No.

Q. So far as you know, where are those books?

A. They should be in the possession of the Acme Meat Company.

(Testimony of Ernest Link.)

Q. What was the practice of making invoices, so far as you know, by the Acme Meat Company, in connection with sales of Meat?

A. The customer would come to the Acme Meat Company. I have witnessed it many times,—and he would buy meat. [116] The meat would be weighed, and the weight and the price would be entered on a bill, which was made out to the customer, and the extensions were, in the case of cash sales, made directly on the spot, and I would check those later. And in case of open account sales, the extensions would be left open, and I would make the calculation, and enter the amount in the accounts receivable ledger.

Q. So far as you know, how many sets of books were there kept by the Acme Meat Company?

A. One set of books.

Q. When I say the Acme Meat Company, I mean Mr. Ormont. Is your answer still the same as to Mr. Ormont?

A. There was a period of partnership of Mr. Ormont with Mr. Salter. It was, I believe, from 1931 until, roughly, 1943.

Q. Regardless of who constituted the partnership, or the operation known as Acme Meat Company?

A. Sam Ormont and Frank Salter at that time.

Q. But the sales and purchases of the Acme Meat Company were then recorded by you in one set of books?

A. Yes.

(Testimony of Ernest Link.)

Q. So far as you know there was just one set of books? A. Yes. [117]

Q. Did you ever see a second set of books dealing with the sales and purchases of the Acme Meat Company? A. No.

Q. That is, for the entire period from 1931 until you left in 1945? A. Yes.

Mr. Strong: May I have these documents marked, your Honor, as Government's Exhibit next in order for identification? I think one number would number be sufficient.

The Court: No. 38.

(The documents referred to were marked Government's Exhibit No. 38 for identification.)

The Court: When you said you carried out the extensions on invoices to open accounts, was the rate indicated on the invoice?

The Witness: Yes.

The Court: By the person who filled it out at the time of the original delivery or sale?

The Witness: Yes.

The Court: Those were in pencil, were they?

The Witness: Yes.

The Court: And all your calculations were made at the rate indicated?

The Witness: That is correct.

Q. (By Mr. Strong): Now may I show you a group of [118] invoices which are marked Government's Exhibit 38 for identification and ask you if you ever saw those before.

(Testimony of Ernest Link.)

Mr. Robnett: If the court please, in connection with these invoices I wish to make an objection that they are incompetent, irrelevant and immaterial, and should not be shown to the witness or any testimony admitted thereon. I have a matter that I would like to present to your Honor.

The Court: Out of the presence of the jury?

Mr. Robnett: Out of the presence of the jury.

The Court: Let me see the documents.

(The documents referred to were passed to the court.)

The Court: Mr. Strong, do these purport to cover a specific and a particular period?

Mr. Strong: 1942. That is count 4.

The Court: The whole year of 1942?

Mr. Strong: This is part of the testimony towards it; yes.

The Court: Your answer is, this is part of the testimony, yes. I am asking, are you offering these as all of the invoices for sales of meat by the defendant Ormont through the Acme Meat Company for the year 1942?

Mr. Strong: No, they are a specific type which I don't know whether your Honor wants me to discuss before hearing the motion or not.

The Court: They are a special type of invoice?

Mr. Strong: Yes. [119]

The Court: In other words, this is a group of invoices selected not at random from his 1942 file?

Mr. Strong: Not at random but for a specific purpose.

(Testimony of Ernest Link.)

The Court: But on the basis that each of these invoices possess a certain and a common characteristic different than the other invoices?

Mr. Strong: Yes, sir. Precisely.

The Court: Let me ask the witness a question.

From your work on the books for the Acme Meat Company, was most of their business an open account business or a large portion of it cash sales?

The Witness: As to the bulk of the figures, I can say quantity——

The Court: Quantity, pounds of meat, I suppose?

The Witness: Would have been open account.

The Court: Would have been open account. As to number of sales?

The Witness: If there were many small cash sales, they might sometimes outnumber the open account sales.

The Court: Can you proceed with something else with the examination of this witness? I dislike to have the jury running up and down the stairs any more than I have to.

Mr. Strong: I suppose, your Honor, from what I know of the testimony which will come forth from this witness in support [120] of the indictment that there will be similar objections, or objections along similar lines, so that it might not be a bad idea to dispose of them at the outset.

The Court: Do you have other exhibits of this nature which you wish to have marked for identification with this witness?

Mr. Strong: Just one more.

(Testimony of Ernest Link.)

The Court: In other words, if you can get all the exhibits you are going to use in with this witness, maybe we can wrap all the objections up at one time.

Mr. Strong: Very well.

The Clerk: No. 39.

(The document referred to was marked Government's Exhibit No. 39 for identification.)

The Court: That is another invoice?

Mr. Strong: That is another invoice.

I might ask him one or two more questions. I don't know whether I can save any time that way or not.

The Court: All right.

Mr. Strong: Is it all right to ask or not to ask?

The Court: You ask the question and then we will decide whether it is right or not. I cannot tell you in advance.

Q. (By Mr. Strong): Now in keeping the books for the Acme Meat Company and Mr. Ormont, did you ever have any discussions with Mr. [121] Ormont during 1942, 1943 or 1944 with reference to making any entries upon the books respecting the purchase of cattle? A. Yes.

Q. Did you have any such discussions with reference to entries which were—strike that.

Did you have any such discussions with Mr. Ormont with reference to entries which you declined to make?

A. I did not decline to make those entries, any entries.

(Testimony of Ernest Link.)

Q. Did you specifically have any discussions with Mr. Ormont during 1944 respecting the changing of record entries as to the cost price of cattle which he had purchased? A. Yes.

Q. When was that discussion had?

A. The latter part——

Q. If there was one or more.

A. The latter part of 1944.

Q. Who was present?

A. Approximately October, November or December.

Q. How many conversations of that kind did you have, approximately?

A. Three or four or five.

Q. About when was the first one held, do you recall?

A. Either in October or November.

Q. 1944? [122] A. 1944.

Q. Who was present?

A. Mr. Ormont and myself.

Q. Where was the conversation held?

A. In his office.

Q. Will you state the conversation?

Mr. Robnett: To which I object, on the ground it is incompetent, irrelevant and immaterial, if the Court please, and doesn't tend to prove any of the issues in this case, namely, the withholding of any income. This went to the matter of outgoing money, I assume, according to the questions.

Mr. Strong: Income for tax purposes depends on both, and also wilfulness. I don't want to discuss it further.

(Testimony of Ernest Link.)

The Court: I understand. The objection is overruled.

The Witness: Will you kindly repeat the question?

The Court: The reporter will read it.

(The record referred to was read by the reporter, as set forth above.)

The Witness: At that time of 1944 there was in existence a subsidy program of the United States Government for cattle slaughterers——

Mr. Strong: Don't describe all the details; just state the conversation.

Mr. Robnett: I move to strike out the statement of the [123] witness as not responsive.

The Court: The response of the witness to the latter question up to this moment may be stricken, and the jury instructed to disregard it. The idea is that you should state what you said to him and what he said to you as near as you can remember in substance.

The Witness: I would be difficult for me to remember all of the conversation.

The Court: It is with everybody. Nobody can ever remember exactly what was said, either as to the amount of words, and so forth, but the substance of the conversation relating to entries in the books concerning purchases of cattle.

The Witness: Mr. Ormont asked me to make certain changes in the subsidy program calculations.

(Testimony of Ernest Link.)

I had figured the cattle according to the actual cost and he would have been penalized by the government.

Mr. Strong: No, not that.

Mr. Robnett: Move to strike that out, that portion of his answer.

The Court: Did you tell him that?

The Witness: Yes.

The Court: Go ahead then. Just what you said. Do not say anything unless that is what the conversation was that passed between you.

The Witness: That was the conversation. [124]

The Court: All right.

The Witness: So he asked me to recheck my figures, which I did, whereupon he suggested that I should enter a different figure on the records, and I had to change the record which were sent in to the government, to the Defense Supply Corporation, in order to avoid the penalty of the subsidy program.

Q. (By Mr. Strong): Was the figure that he suggested to you as you have testified the one that you arrived at?

Mr. Robnett: Just a moment. I want to move to strike out the answer of the witness to the prior question, if the court please, on the ground that it is incompetent, irrelevant and immaterial, and not within the issues in this case. He is talking about some records, some subsidy proposition, and not a question of income. [125]

(Testimony of Ernest Link.)

The Court: The testimony is admissible as going to the amount of his income, and as to whether or not he committed a wilful act in failing to report the true amount. If at the appropriate time this is not connected with the question at issue, to-wit, whether or not he reported, or to wilfulness——

Mr. Strong: Did you say and or wilfulness?

The Court: Or wilfulness.

Mr. Strong: I submit it should be or.

The Court: We will argue that in the instructions. I have already told the jury that not only must the fact be proven as to the amount of his income and the amount of his return, but the fact that it was incorrectly returned, and in order to convict him they must show that his conduct was wilful.

Q. (By Mr. Strong): The amount which you entered was entered on the books of the Acme Meat Company? A. Yes.

Q. And the amount which was changed, as you testified, was entered on the books of the Acme Meat Company?

A. It was entered on the copy that went to the Defense Supply Corporation—all the copies.

Mr. Robnett: I move to strike the answer upon the ground that it is incompetent and irrelevant.

The Court: The answer may be stricken. The question is [126] whether or not it was entered on the books.

The Witness: May I ask a question?

The Court: Surely.

(Testimony of Ernest Link.)

The Witness: What do you consider the books?

The Court: The regular records of the Acme Meat Company. You had a set of books which you took home and wrote in?

The Witness: Yes.

The Court: That is what we mean by the books.

The Witness: But this was a loose record sent in every month—

The Court: We all either know or can guess what they are. But counsel wants to know the only thing material at this stage of the proceedings—whether or not you changed an entry on the original books.

The Witness: Yes.

Q. (By Mr. Strong): And the second thing that I want to know is this: You testified as to an amount which you had originally entered, is that right? A. Yes.

Q. You testified about a conversation with Mr. Ormont, changing the amount? A. Yes.

Q. Did you make the change? [127]

A. Yes.

Q. Was the figure which you ultimately entered pursuant to the conversation the true figure?

A. No.

Q. What was wrong with it?

A. It was a figure to avoid the penalty.

Mr. Robnett: I object to that—

The Court: What was wrong with it, is a pretty broad question.

Q. (By Mr. Strong): Was it correct or incorrect? A. Incorrect.

(Testimony of Ernest Link.)

The Court: You just said it was not the true figure. What was the true figure?

The Witness: The one I entered.

The Court: How much was it?

The Witness: I don't remember.

The Court: Do you remember the difference between the amount that you entered and the true figures?

The Witness: There were several instances. They amounted to about \$3,000.00.

Q. Altogether?

The Witness: Altogether.

The Court: Were they an increase or decrease of the amount of money paid to the purchaser for cattle? [128]

The Witness: It increased the amount of payment to the purchaser of the cattle.

Q. (By Mr. Strong): In other words, the figure that you finally entered was more than you actually paid?

Mr. Robnett: I object to that upon the ground that it is a conclusion.

The Court: It is leading and suggestive. Sustained.

Q. (By Mr. Strong): What was the figure you ultimately entered with reference to the amount?

The Court: He just told you.

Mr. Strong: I don't understand. May I have the record read?

(Record read by the reporter.)

(Testimony of Ernest Link.)

The Court: It increased the amount of money paid to the purchaser for the cattle?

Q. (By Mr. Strong): Do you mean that increased it on the books, or that actually increased the payment?

A. That actually increased the payment.

Q. Do you mean that that extra money was paid to the seller of the cattle? A. No.

Q. Just on the books? [129]

A. Just on the books. Pardon me. I misunderstood.

Q. You said several instances. During what period did the instances occur which you have testified to?

A. October, November, December, 1944.

Q. In each of those instances did you have a discussion with Mr. Ormont regarding the matter?

A. Yes. Sometimes it was over the telephone.

Q. Who suggested the increase in the figures?

Mr. Robnett: I object to that as leading and suggestive, and ask that the witness be allowed to merely give the conversation.

The Court: Sustained.

Q. (By Mr. Strong): Give the conversation.

The Court: You had better lay the foundation. When was it?

Mr. Strong: I was trying to save time.

The Court: October, November and December?

Q. (By Mr. Strong): In the first instance, will you state with whom you had the conversation?

The Court: He has already stated.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): In the second instance?

A. I was told by Mr. Ormont to raise the figure again. [130]

Q. In the third instance?

A. The same thing.

Q. In the fourth instance?

A. I believe there were only three instances.

Q. So in every instance it was the same?

A. Yes; a different amount.

Mr. Strong: If your Honor please, I would like to go to those invoices now before I go to another phase of questioning.

The Court: All right. The jury will retire to the jury room. We will buzz for you. Remember the admonition.

(Jury retires from the court room.)

Mr. Robnett: At this time, your Honor——

The Court: Let me see Exhibit 39 for identification, the one invoice. I think the witness can step down.

Mr. Robnett: As to each and all of these invoices embraced in exhibits for identification, Nos. 38 and 39, I at this time want to make a motion to suppress those invoices and any evidence concerning them, on the ground that those were taken by someone from Mr. Ormont's office, from his files, without his consent, and this is the first time that they have shown up. He did not see the party take them, but they were missing from his files. I want to put Mr. Ormont on for the purpose of establishing they were without his consent. [131]

The Court: Even if they were missing from his files, they would not be subject to suppression unless they were taken from his files by an agent of the Government. If they were taken by somebody and ultimately were found in the hands of the Government, under your statement that would not be sufficient to order them suppressed.

Mr. Robnett: I expect to go a little further with the evidence than I have stated. I expect to show from Mr. Ormont that they were there at the time some Government officials came to the office to examine the records, and afterward, after they had gone, they were not there. That is as far as I can go.

The Court: Have you read the Harris case?

Mr. Robnett: No, I have not, your Honor.

The Court: You will have to get ready for a shock when you read it. In the Harris case, that was just decided—you are familiar with the name?

Mr. Robnett: Yes, I am.

The Court: They arrested a man in his six-room apartment, charging him with mail fraud. They put handcuffs on him, and left him in the center of the living room, and conducted a complete and thorough search of the entire house; and took up mattresses, examined the bureau and beds, upsetting things, clothing and everything, inside the house, and finally they found an envelope in the bureau drawer marked: [132] George Harris, Personal. It was sealed. They opened it and found draft cards. They never prosecuted him for mail

fraud, but prosecuted him for unlawful possession of draft cards. The Supreme Court held they were lawfully taken. Now, if they can do that, I don't know what there is to the proposition of ever suppressing any evidence, that belongs to the defendant. Of course, they did point out finally in the decision that these draft cards were Government property, and never belonged to the defendant.

Mr. Robnett: Those here would not be government property.

The Court: What do you propose to show by the defendant Ormont?

Mr. Robnett: I propose to show that these invoices were in his office, and in his files in his office, and that agents of the Government——

The Court: What bureau or department?

Mr. Robnett: They were agents from the Internal Revenue Department, I think. They came there and wanted to look his records over, and did do so.

The Court: Did he consent?

Mr. Robnett: I think he did consent.

The Court: I suppressed the evidence in the Glick Lumber Company case, and the Circuit Court reversed me.

Mr. Robnett: He only consented to them looking them [133] over. He did not consent to their taking them.

The Court: The same situation. They took them out, and copied them, and brought them back, and did not bring some of them back, but he consented, and the Circuit Court held that he consented, and

therefore they had a right to take them. I suppose, however, in view of your objection, the best thing to do is to make a record, because I doubt if the Appellate Courts are through with this question.

Mr. Robnett: I would like then to call Mr. Ormont to the stand.

The Court: We will take a short recess.

(Short recess.) [134]

The Court: In the case of U. S. vs. Ormont, Mr. Robnett?

Mr. Robnett: Your Honor, I find this situation, I spoke a little out of turn as to what I understood about the invoices. There were some invoices that disappeared, as I have stated, but I am now told by my client that he cannot say that these invoices were taken in that fashion, although they were taken by someone without his consent. Therefore I feel that I, in the first instance, should make the apology to any officers of the Government that I might have inferred had taken them because I don't know that they did at all, and therefore I want to correct the record in that respect. And as to these particular ones, since my witness could not say positively that they were there at the time the officers were there, I naturally wouldn't want to press my objection to suppress because I wouldn't have sufficient ground.

The Court: Very well.

Mr. Robnett: I thank you very much for giving me consideration.

The Court: Call the jury down.

(The jury returned to the courtroom at 3:25 o'clock p.m.)

The Court: I wish to commend you for your candor, Mr. Robnett.

Mr. Robnett: I was mistaken. There were some missing and I thought these were the ones. [135]

The Court: Very well.

Mr. Strong: I can state for the record that these were obtained by Mr. Link, and he will so testify. In other words, he will disclose where they came from.

The Court: Mr. Link, will you resume the stand?

ERNEST LINK

resumed the stand and testified further as follows:

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: Usual stipulation.

At this time I withdraw my objection to the exhibits. At least counsel was offering them and was asking questions as to them.

The Court: I do not think he had offered them in evidence. He had exhibited them to the witness.

Mr. Robnett: Yes.

The Court: Your objection is withdrawn.

Mr. Katz, usual stipulation?

Mr. Katz: If the Court please, my understanding is that all of this——

The Court: No, the usual stipulation, to wit, that the defendants are present in person and by

(Testimony of Ernest Link.)

counsel and each one of the jurors is present and in his or her respective place.

Mr. Katz: So stipulated, your Honor.

The Court: Very well. [136]

Direct Examination

(Continued)

By Mr. Strong:

Q. Mr. Witness, would you please look at those two sets of exhibits, which I believe are Government's Exhibits 38 and 39 for identification, is that right? A. Yes.

Q. And will you state whether you ever saw them before?

A. (Examining documents): No, I have not seen these.

Q. Which ones? A. All of these.

Q. You never saw them before?

A. Yes, I have seen them. I have not seen them—pardon me—I gave you the wrong answer. I have seen these before; yes.

Q. Which ones? A. All of them.

Q. Nos. 38 and 39 for identification?

A. Yes.

Q. And you have seen each of the invoices which make up Government's Exhibit 38 for identification? A. Yes.

Q. Now will you state what they are, if you know? A. They are invoices——

Mr. Robnett: I submit that they speak for themselves, and they are the best evidence of what they are.

(Testimony of Ernest Link.)

Mr. Strong: All right. That is satisfactory.

Mr. Robnett: It is purely an opinion of the witness.

Mr. Strong: I will ask another question.

The Court: I don't know. They speak for themselves as to what they are on their face, but what they are with relation to any set of books——

Mr. Strong: I was getting to that next, your Honor.

The Witness: They are cash sales for meat, meat sold by Acme Meat Company, to various customers.

Q. (By Mr. Strong): As far as you know, is payment made on those invoices?

A. They are all marked paid. [138]

Q. Did you see any names on them?

A. Yes.

Q. Do you recognize the signature appearing on those? A. For the receipt, yes.

Q. Whose signature is it?

A. Sam Ormont's signature.

Q. Is that the defendant in this case?

A. Yes.

Q. Will you state whether any of these invoices which are marked Government's Exhibits 38 and 39 for identification, were ever entered by you on the books of the Acme Meat Company?

A. They were not entered.

Q. How do you know?

A. Because they do not bear my entry marks, nor my check marks for the extensions.

(Testimony of Ernest Link.)

Q. Will you state where you have previously seen these invoices, if you have seen them anywhere outside of this court room?

A. Yes, I obtained them in the office of the Acme Meat Company, where they were being used as scratch paper. So I picked up part of them, and took them with me home to use them for the same purpose, and I recognized that I had never seen those before, so I kept them.

Q. Were there any other such invoices, which had not been recorded by you, being used in the office of the Acme [139] Meat Company?

Mr. Robnett: I object to that as asking for the conclusion of the witness—other similar invoices.

The Court: Let me hear the question.

(Question read by the reporter.)

The Court: Objection overruled.

A. No.

Q. (By Mr. Strong): So far as you know, those are the only ones? A. Those are.

Q. Did you ever have any discussion with the defendant Sam Ormont concerning these invoices, Government's Exhibits 38 and 39 for identification?

A. No.

Mr. Strong: I offer these exhibits in evidence, your Honor, 38 and 39 for identification.

The Court: Admitted.

(The documents heretofore marked for identification were received in evidence and marked Government's Exhibits 38 and 39 and were received in evidence.)

(Testimony of Ernest Link.)

Q. (By Mr. Strong): By the way, were these Exhibits 38 and 39 for identification turned over by you to the Government? A. Yes.

The Court: When was it that you saw them in the office [140] of the Acme Meat Company?

The Witness: It was in 1944. I cannot tell exactly when.

The Court: 1944?

The Witness: 1944.

The Court: And they are all dated 1942?

The Witness: Yes.

The Court: Did you check your books to see if you had any corresponding entries of cash sales for those years?

The Witness: No, I did not check them.

Q. You did not check 1942?

A. I did not check those against those periods, no.

Q. Not against those periods? A. No.

Q. (By Mr. Strong): When you made entries of amounts on the invoices in the books, you made a certain designation on the invoices?

A. Yes.

Q. Do those designations appear on those invoices? A. No.

Q. So far as you know, those were never recorded by you? A. Yes.

Q. That is, in the books of the Acme Meat Company? A. That's right.

Q. Did you ever observe, in connection with your [141] duties, the receipt of any money by

(Testimony of Ernest Link.)

either Sam Ormont, or the defendant Phillip Himmelfarb, which was not recorded by you subsequently on the books of the Acme Meat Company?

Mr. Katz: That is objected to on behalf of the defendant Himmelfarb upon the ground that it is immaterial, and as not bearing on any issue before this Court. No foundation has been laid for that, and on the ground that the books would be the best evidence of what was or was not recorded.

Mr. Strong: What books or records? Do you have any books or any records?

The Witness: No.

The Court: Objection sustained.

Mr. Robnett: I would object on the same ground for Mr. Ormont, your Honor.

The Court: Objection sustained.

Q. (By Mr. Strong): Did you ever observe the defendant Sam Ormont making any sales of meat on the premises of the Acme Meat Company?

A. Yes.

Mr. Robnett: I object to that as immaterial.

The Court: Obviously it is preliminary.

Q. (By Mr. Strong): Did you ever observe the defendant Sam Ormont receive payment for meat sold by him, in cash? A. Yes. [142]

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial.

The Court: It is still preliminary. It is immaterial unless it is preliminary. Is it preliminary?

Mr. Strong: Yes, I am getting to the money.

(Testimony of Ernest Link.)

Q. Did you ever have any discussion with the defendant Sam Ormont regarding the receipt of any money in connection with meat sales, that was not turned over to you? A. No.

Mr. Robnett: I object to that as assuming it was not turned over to him. There is no evidence that it was not turned over to him.

The Court: He has answered no.

Q. (By Mr. Strong): Did you have any discussions with the defendant Sam Ormont regarding receipts in connection with sales of meat, besides those which were given to you on the invoices?

A. No.

Q. Did you ever have any discussions with Sam Ormont, during 1942, 1943 or 1944, regarding any sums of money which were received by him in the sale of meat? A. No.

Q. You never talked to him about any moneys?

A. Except the deposits to be made in the bank.

Q. Did you ever discuss with the defendant Sam Ormont [143] or the defendant Phillip Himmelfarb, the receipt of any money in addition to the amount shown on the invoices?

Mr. Katz: I object to that as leading and suggestive, incompetent, irrelevant and immaterial; no foundation laid for the question as to the defendant Himmelfarb.

Mr. Robnett: I join in the objection.

The Court: Let me hear the question.

(Question read by the reporter.)

(Testimony of Ernest Link.)

The Court: There isn't any foundation laid for that question so far as the defendant Himmelfarb is concerned. The objection will be sustained as to the defendant Himmelfarb, and overruled as to Ormont.

The Witness: No. [144]

Q. (By Mr. Strong): Did you ever observe the defendant Sam Ormont receive any money in connection with sales of meat in addition to the amounts shown on the invoice?

Mr. Robnett: Object to that as calling for a conclusion of the witness.

The Court: Objection sustained

Q. (By Mr. Strong): State what, if anything, you observed with reference to the collection by Sam Ormont of moneys in addition to those shown on the invoices.

Mr. Robnett: Object to that as assuming something not in evidence.

The Court: Objection sustained.

Mr. Robnett: And calling for a conclusion and opinion of the witness.

The Court: Objection sustained.

Mr. Strong: May I approach the bench, your Honor?

The Court: All the defendants and their lawyers have to come up. It has to be in the presence of the defendants. There isn't enough room for everybody.

Mr Strong: That is a big bench, your Honor.

The Court: No. If you wish the jury excused, I will excuse them.

(Testimony of Ernest Link.)

Mr. Strong: I don't want the jury walking up and down [145] the stairs.

The Court: You can proceed and present whatever you have until the conclusion of the session this afternoon.

Mr. Strong: What time will we conclude?

The Court: About 4:30, I guess.

Mr. Strong: Well, your Honor, it relates to these questions, about something that went on in discussion in your Honor's chambers.

The Court: Proceed.

Mr. Strong: All right.

The Court: What do you mean, went on in my chambers?

Mr. Strong: We had some conferences with counsel outside the hearing of the jury

The Court: In the presence, however, of all counsel?

Mr. Strong: Oh, yes. All counsel were there.

The Court: Very well.

Q. (By Mr. Strong): Mr. Link, did you prepare or assist in the preparation of the income tax return for the defendant Sam Ormont for the calendar year 1944? A. Yes.

Q. I show you Government's Exhibit 3, which is a photostatic copy of Sam Ormont's return for the calendar year 1944, and ask whether that is the return which you just spoke of, or a photostat of that return. [146] A. Yes.

Q Did you prepare the return itself?

A. Yes.

(Testimony of Ernest Link.)

Q. Did you discuss the entires on that return with the defendant Ormont? A. Yes.

Q. Where did you obtain the figures which were placed upon the return?

A. Most of it was obtained from the set of books which I kept for the Acme Meat Company.

Q. I can't hear you. Will you speak a little louder?

A. I obtained the figures from the set of books of the Acme Meat Company.

Q. Was there any other source of information?

A. Yes, from Mr. Ormont himself.

Q. What did you discuss with him? The items on the return?

A. Not any figures that concerned what the books reflected; any other income that might have to be added to what the books reported as the proceeds from business.

Q. Did Mr. Ormont give you any other—

The Court: Pardon me. The exhibit you showed the witness, was that the income tax return of the defendant Ormont involved in count 1?

Mr. Strong: Yes, your Honor. [147]

The Court: That is the individual and not the partnership return?

Mr. Strong: Just the individual.

The Court: The individual return?

Mr. Strong: Yes, sir.

The Court: Did you prepare the partnership return too?

(Testimony of Ernest Link.)

The Witness: There was no partnership in 1944.

Mr Robnett: I move to strike out the answer on the ground it is a conclusion of the witness.

Mr. Strong: I think it is a statement of fact, your Honor.

Mr. Robnett: It is not responsive to the question.

The Court: There is one partnership return here in evidence.

Mr. Strong: Yes, it is No. 6, which is a document which is ambiguous in nature.

The Court: Let us find out about it. I will withdraw the question I asked and instruct the jury to disregard my question.

Mr. Robnett: What about the answer that the witness gave? I move to strike it out, your Honor.

The Court: The question is out so the answer goes out too

In preparing Exhibit No.—what is the number?

The Witness: 3. [148]

The Court: —No. 3, did you prepare this directly from the books?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Strong): And did you include on that return, which is Government's Exhibit No. 3, any figure as to income which figures you obtained from Mr. Ormont? A. Yes.

Q. What particular figures were those?

A. I believe there was income from bonds, from war bonds, which I included in that figure.

(Testimony of Ernest Link.)

Q. And you got the information as to that income from whom? A. Mr. Ormont.

Q. Did you ask him or did he volunteer?

A. He told me voluntarily.

Mr. Robnett: I object to that.

The Court: Is there an objection?

Mr. Strong: I heard something that sounded like one.

Mr. Robnett: I will withdraw the objection.

Q (By Mr. Strong): Did you ask Mr. Ormont whether he had any income in addition to that which you reported on the return?

Mr. Robnett: I object to this as leading and suggestive. [149] He might ask him what the conversation was.

The Court: Objection sustained.

Q. (By Mr. Strong): State what the conversation was, Mr. Link.

A. It was always—I cannot give you any conversation.

Q. In substance, not the precise words, Mr. Link. Nobody remembers the precise words

A. It is always my habit when making income tax reports——

Q. Not what is always your habit, but what did you do in this instance?

A. I did ask if that was all the income.

Q. Whom did you ask? A. Mr. Ormont.

Q. What did he tell you?

A. Yes. He gave me the figure for the war bonds interest.

(Testimony of Ernest Link.)

Q Is that included there?

A. That is included.

Q. How much is that?

A. I don't remember.

Q. Look at the return.

A. It is so small I cannot read it.

The Court: You mean the figures are so small?

The Witness: No, the lines on this photostat. I believe it is the first figure.

The Court: No. 3, enter here the total amount of your dividends and interest including interest from government obligations unless wholly exempt from taxation, is that the one?

The Witness: Yes.

The Court: \$1375?

The Witness: That is correct.

Q. (By Mr. Strong): Did you prepare the return for Phillip Himmelfarb? A. No.

Q. For any year? A. No.

Q. By the way, did you prepare the returns for Mr. Ormont for any other years besides that one?

A. Yes.

Q. For what year?

A. 1942 and 1943 and also previous years.

Q. I show you Government's Exhibits 1 and 2, No. 1 is an income tax return for the calendar year 1942 for Sam Ormont, and No. 2 is an income tax return for the calendar year 1943 for Sam Ormont. Will you state whether you prepared those two?

A. Yes, I did. [151]

Q. Which ones? A. Both of them.

(Testimony of Ernest Link.)

Q. Where did you get the figures which you included on those two returns?

A. From the books of the Acme Meat Company.

Q. Did you have any discussions with the defendant Sam Ormont regarding those returns or the figures on them? A. Yes.

Q. Now take the 1942 return and state what discussion you had with Sam Ormont regarding those returns or the figures on them. A. Yes.

Q. Now take the 1942 return and state what discussion you had with Sam Ormont regarding that return?

A. Whether that was his income, his complete income.

Q. What did he tell you? A. Yes.

Q. Is that all the discussion?

A. That is all, in toto, yes.

Q. Now the 1943 return, did you have a discussion with Mr. Ormont regarding that?

A. Yes.

Q. What was the discussion?

A. The same discussion; same question, whether it was his income, whether there were any additions.

Q. What was the answer? A. No.

Q. No what?

A. There were no other additions than what the books reflect. [152]

Q. And did you see Mr. Ormont sign any one of those three income tax returns?

A. No, I did not see him sign them.

(Testimony of Ernest Link.)

Q. You turned them over to him? A. Yes.

Q. Now, Mr. Link, did you ever see any other record of income of either Sam Ormont or Phillip Himmelfarb, or the defendant Acme Meat Company, besides the records——

The Court: The defendant Acme Meat Company?

Mr. Strong: Not the defendant; the defendant Sam Ormont, the defendant Phillip Himmelfarb and the Acme Meat Company, not a defendant.

Mr. Katz: I object to that, if the court please, on the ground that as to the defendant Himmelfarb there is no foundation laid, it assumes facts not in evidence, incompetent, irrelevant and immaterial, has no bearing on any issues in this case.

Mr. Robnett: I adopt the same objection for Mr. Ormont and add to it that it is asking for an opinion of the witness to-wit, namely, whether it is a record of income.

The Court: Let me hear the question again.

(The question referred to was read by the reporter, as follows:

“Q. Now, Mr. Link, did you ever see any other record of [153] income of either Sam Ormont or Phillip Himmelfarb, or the Acme Meat Company, besides the records you have testified to here?”)

The Court: There is no foundation for Himmelfarb. The objection as to Phillip Himmelfarb

(Testimony of Ernest Link.)

is sustained. The objection is overruled as to the defendant Ormont. The witness may answer the question.

Do you remember it?

The Witness: Yes, I do.

No, I saw no records.

Q. (By Mr. Strong): Did you see anything?

A. Yes.

Q. What?

A. I saw the taking of money.

Mr. Robnett: I object to that and move to strike it out, if the court please, on the ground it is incompetent, irrelevant and immaterial, and doesn't show income.

Mr. Strong: He hasn't finished yet, your Honor.

The Court: Well, at the present stage of the answer it is a conclusion of the witness and is objectionable.

Q. (By Mr. Strong): Describe what you saw.

The Court: The answer may be stricken. The jury is instructed to disregard it. Obviously the defendant Sam [154] Ormont was in business and he had to take money from somebody.

Mr. Strong: My understanding is that the witness is testifying to money——

The Court: He just said he saw him take money. He hasn't testified to anything else.

Mr. Strong: Let me go back for a moment.

Q. Do you know the defendant Phillip Himmelfarb?
A. Yes.

(Testimony of Ernest Link.)

Q. Did you see Mr. Himmelfarb on the premises of the Acme Meat Company at any time?

A. Yes. [155]

Q. During what period?

A. During 1944 and 1945.

Q. Will you state what you observed him doing?

Mr. Katz: That is objected to upon the ground that no foundation has been laid as to time and place.

Mr. Strong: The place is the premises, and the time is 1944 and 1945.

The Court: I take it that your question generally is as to what he was doing.

Mr. Strong: I want to show how he was——

The Court: I think it is a little too broad. What did you see him doing in 1944 and 1945 is liable to cover quite a variety of situations.

Q. (By Mr. Strong): Did you see Mr. Himmelfarb performing any work on the premises of the Acme Meat Company during 1944?

A. Yes.

Q. And during 1945? A. Yes.

Q. What did you observe?

Mr. Katz: I object to that, if the Court please, as too indefinite; no foundation laid.

The Court: Overruled.

A. I saw Mr. Himmelfarb making out invoices to customers when they would come to the Acme Meat Company. He would [156] then compute on the machine in the office the amount due by the customer; then he would make after that computation

(Testimony of Ernest Link.)

another computation on the machine, a multiplication of the weight of that carcass of beef, or whatever it may have been, and enter this figure which was, as a rule, a computation——

Mr. Katz: That is objected to, if the Court please. The witness quite obviously is testifying to a conclusion, and to opinions on the part of the witness, without any foundation being laid therefor.

The Court: The question is all right to where he stated just now as a rule, and he would enter the computation. From there you can go on, but not anything else about your ideas as to why he was doing it.

The Witness: I saw him compute the weight of the bill with the figure 3, and enter the amount on a list which was kept in the drawer of that desk.

Q. (By Mr. Strong): What desk?

A. Of the desk of the Acme Meat Company, in the office.

Mr. Robnett: I move to strike out the answer as to Mr. Ormont upon the ground that it is hearsay and the opinion of the witness, and is not binding upon Sam Ormont.

Mr. Strong: We will tie it up, your Honor, with Sam Ormont.

Mr. Robnett: It is incompetent, irrelevant and immaterial. [157]

The Court: That was at the Acme Meat Company?

The Witness: Yes.

(Testimony of Ernest Link.)

The Court: There is testimony in the record that the defendant Sam Ormont owned the Acme Meat Company in 1944. The objection will be overruled as to both defendants.

Q. (By Mr. Strong): Did Mr. Himmelfarb work at the Acme Meat Company?

Mr. Katz: I object to that as calling for the conclusion of the witness.

Q. (By Mr. Strong): State, if you know, what he did.

The Court: Do you withdraw the last question?

Mr. Strong: I withdraw it, to save time.

The Court: I thought you just asked him what Mr. Himmelfarb did down there, and he described it.

Mr. Strong: Then he went into some particular details. I would like to know what the defendant did.

The Court: Did you see him do anything else other than what you have just got through describing?

A. Yes.

The Court: He may express his conclusion generally. Himmelfarb, was he down there in connection with the company in some way or another?

The Witness: Yes.

Q. (By Mr. Strong): In what way?

The Court: If you know. Do you know?

A. He was selling beef and other meat cuts to the trade.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): For the Acme Meat Company?

A. For the Acme Meat Company.

Q. As an employee?

The Court: Do you know whether or not he was an employee or one of the owners, or how he was connected? Do you know that?

A. What is that?

Q. Whether or not he was an employee or otherwise connected with the company? The answer to that is yes or no? Do you know it?

A. I can say yes and no, because I know two sides of it.

Q. You know two sides? A. Yes.

Q. What I am trying to get at is, when I asked you if you know, if you know it of your own knowledge, or if you just heard someone gossiping or not?

A. No, it is definitely knowledge.

Q. You know that? A. Yes. [159]

Q. What was his relationship to the Acme Meat Company? A. He was a partner.

Q. He was a partner when?

A. In 1944 and 1945.

Q. And 1945? A. Yes.

Mr. Robnett: I move to strike out the answer as a conclusion of the witness, if the Court please.

Mr. Strong: We have further proof.

The Court: That is a legal conclusion, whether a person is a partner, or is not. I think probably your objection is good as to both defendants, and the jury will be instructed to disregard the answer

(Testimony of Ernest Link.)

of the witness. I think perhaps more foundation can be laid.

The Court: Did you make out the payroll checks?

A. No.

Q. Did you audit the payroll checks?

A. Yes.

Q. You checked them in the book.

A. Yes.

Q. Against the check books? A. Yes.

Q. Were they payroll checks to Phillip Himmelfarb?

A. Yes. That's why the answer was yes and no.

Mr. Strong: If your Honor please, I started this to get Mr. Himmelfarb into the picture, but I have forgotten what I was getting him into. The question I asked was sustained as to Mr. Himmelfarb, because he was not in the picture. May I have the question read?

(Record read by the reporter.)

The Court: You had better ask another question. What you are trying to find out is the connection of Himmelfarb with the Acme Meat Company?

Mr. Strong: For a purpose. We will leave that for the time being.

Q. These entries which you discussed, which you saw Mr. Himmelfarb making on the sheets of paper, was it—— A. It was a list, yes.

(Testimony of Ernest Link.)

Q. Did you ever see Mr. Himmelfarb receive any sums of money in connection with the sale of meat, which he entered on those sheets you have described?

Mr. Katz: I object to that, as a conclusion of the witness; incompetent, irrelevant and immaterial; no foundation laid.

Mr. Robnett: It is incompetent, irrelevant and immaterial as to Mr. Ormont. There is no connection between Mr. Ormont and Mr. Himmelfarb shown here except as an employee.

Mr. Strong: I don't know that it is shown except as an employee. [161]

Mr. Robnett: It is shown he received employee's checks.

The Court: That is the record up to now.

Mr. Strong: It shows the receipt of those checks by him.

The Court: Payroll checks. Let me hear that.

(Record read by the reporter.)

The Court: The objection is overruled as to both defendants.

A. Not in connection with that list.

Q. (By Mr. Strong): What did you observe in connection with that list?

A. I saw on the list the names of customers and the amounts placed opposite those names of the customers. Sometimes they were written in the handwriting of Mr. Himmelfarb, and sometimes in

(Testimony of Ernest Link.)

the handwriting of Mr. Ormont. Some of them were marked "Paid" and crossed out; some of them were left open, and not crossed out.

Q. Did you record any of those amounts on those sheets into the records and books of the Acme Meat Company?

Mr. Katz: Objected to as to the defendant Himmelfarb. It is incompetent, irrelevant and immaterial. The books and records are the best evidence.

Mr. Strong: We don't have them.

Mr. Robinett: We join in the objection.

The Court: Objection overruled.

Q. Did you record any of the amounts from that list you [162] have spoken of into the books and records which you kept of the Acme Meat Company?

A. No.

Q. (By Mr. Strong): With reference to Mr. Himmelfarb—

The Court: Did you ever examine that list?

A. That one time.

Q. One time? A. Yes.

Q. You say there were names of people on the list? A. Yes.

Q. And figures?

A. Yes. I had half an hour's time to study it.

Q. (By Mr. Strong): Mr. Witness, will you state from your knowledge of the books and records of the Acme Meat Company how the profits were distributed for the year 1944?

(Testimony of Ernest Link.)

Mr. Robnett: That is objected to as incompetent, irrelevant and immaterial, and his conclusion, and assuming something not in evidence, namely, that there were profits.

Mr. Katz: I will add to that, if the Court please, that the books and records are the best evidence.

Mr. Strong: The profits are shown on the income tax returns which are in evidence, your Honor. We don't have the books. [163]

The Court: What was the question?

(Question read by the reporter.)

The Court: Overruled.

A. To the best of my knowledge they were credited to the account of Sam Ormont. [164]

Q. (By Mr. Strong): For the entire year?

A. Yes.

Q. That is for the year 1944? A. Yes.

Q. Did you observe any increase, or did you make any entries on the books or records of the Acme Meat Company, distributing any of the profits for the year 1942, '43 or '44 to the defendant Himmelfarb?

Mr. Katz: Objected to, if the Court please, as to 1944 it has been asked and answered, and as to any previous year it is incompetent, irrelevant and immaterial. There is no issue in this case as to the years previous to 1944.

The Court: Objection sustained.

Q. (By Mr. Strong): As to 1944 then?

The Court: He just answered it. I sustained the objection.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): Now are you sure that you remember correctly what the books showed for that year?

Mr. Katz: If the Court please, the Government cannot impeach its own witness. It is argumentative.

Mr. Strong: I am trying to refresh his recollection.

The Court: It is argumentative. Objection sustained. [165] There is nothing in the books that says you cannot impeach your own witness.

Mr. Katz: I think that is right, but I believe the foundation has to be laid, your Honor.

The Court: Mr. Link, do you have a little difficulty hearing?

The Witness: On the right ear; yes.

The Court: Have you had any difficulty hearing Mr. Strong's questions?

The Witness: No.

The Court: Very well.

Q. (By Mr. Strong): Aside from the records and the books of the Acme Meat Company do you have any knowledge as to how the profits of the Acme Meat Company for the year 1944 were distributed?

Mr. Katz: Objected to, if the Court please, as incompetent, irrelevant and immaterial, no foundation laid for that question as against the defendant Himmelfarb, calls for a conclusion, not the best evidence.

(Testimony of Ernest Link.)

Mr. Robnett: I object on the further ground it has been asked and answered. He said it was distributed to the best of his knowledge.

The Court: The question is now aside from the books. Does he have any knowledge. The objections are overruled as to both defendants and the question must be answered yes or [166] no, whether you have any knowledge.

The Witness: Yes.

Q. (By Mr. Strong): Will you state how the income was distributed for the year 1944 of the Acme Meat Company?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial, if the Court please. We cannot tell what his foundation is for his knowledge.

The Court: You object on the ground there is no foundation?

Mr. Robnett: No foundation.

The Court: Sustained.

Q. (By Mr. Strong): Will you state on what basis you know?

Mr. Robnett: Same objection, if the Court please.

The Court: You said you had some knowledge outside of the books?

The Witness: Yes.

The Court: How do you know? Did somebody tell you?

The Witness: Mr. Ormont told me.

The Court: Mr. Ormont told you?

The Witness: Yes.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): Is that the defendant Ormont? A. Yes. [167]

Q. Will you state what he told you?

Mr. Katz: Objected to, if the Court please.

The Court: No foundation; time, place, persons present.

Q. (By Mr. Strong): Will you state when this happened and who was present?

A. It happened at the office of the Acme Meat Company in 19—I don't really recollect whether it was at the end or in the begining of 1945.

Q. Who was present? A. Mr. Ormont.

Q. Anybody else? A. No.

Q. Will you state what Mr. Ormont said to you?

Mr. Katz: Objected to, if the Court please, as against the defendant Himmelfarb it is hearsay.

The Court: Objection sustained as to the defendant Himmelfarb.

Mr. Robnett: I am going to object to it for Mr. Ormont on the ground it is after 1944 and is therefore incompetent, irrelevant and immaterial, doesn't go to prove any income for 1944 by either defendant.

The Court: Objection overruled as to the defendant Ormont.

The Witness: Mr. Ormont told me that it was impossible [168] to carry Mr. Phillip Himmelfarb on the books of the Acme Meat Company as a partner although he was a partner because that would spoil some of the subsidy payments and therefore I should list him as an employee, and that the profit was to be distributed to both accounts at certain periods.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): Did you so distribute the profits? A. Yes.

The Court: I thought you just said you didn't.

The Witness: That is technically wages; not profits from the books.

The Court: All right.

Mr. Strong: What he said, your Honor, was from the books and records.

The Court: I know what he said.

Mr. Strong: This is a technical case.

The Court: He said he paid him wages and he said a few minutes ago he didn't know anything from the books whether anybody was interested besides Ormont.

Mr. Strong: From the books.

The Court: From the books.

Mr. Strong: And this is from outside the books.

Q. Is that right? A. Correct.

The Court: The jury are going to have to decide that. [169]

Q. (By Mr. Strong): Did you ever see the defendant Himmelfarb in connection with sales of meat collect any money from the purchasers in addition to the amounts shown on the invoices?

Mr. Katz: Objected to, if the Court please, as leading and suggestive, calls for a conclusion of the witness, there is no foundation laid, assumes facts not in evidence, incompetent, irrelevant and immaterial.

The Court: Sustained.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): Did you during 1945 have any discussion with the defendant Sam Ormont concerning the collection of sums by him, of any sums by him, in addition to those shown on invoices for the years 1942, '43 or '44?

Mr. Robnett: Object to that as not showing time, place or persons present.

Mr. Strong: If he says yes, I will get to the latter.

The Court: That calls for a yes or no answer. Do you remember the question?

The Witness: Yes.

Yes, is the answer.

Q. (By Mr. Strong): When, where and who was present on the first, if there were more than one such occasions?

A. It was only Mr. Ormont and myself; [170]

Q. When? A. The day when I left him.

Q. What was the date?

A. The 15th of April, I believe.

Q. What year? A. 1945.

Q. Where?

A. At the Acme Meat Company plant in South Gate.

Q. Who was present?

A. Mr. Ormont and myself.

Q. Will you state what was said by Mr. Ormont to you and by you to Mr. Ormont in that connection?

Mr. Katz: Objected to as hearsay, if the Court please.

(Testimony of Ernest Link.)

The Court: Objection sustained as to the defendant Phillip Himmelfarb only.

The Witness: I told him at that time that I was leaving his services, and he asked me to stay, and I told him that I preferred not to work for one who was working—who was doing a shady business.

Mr. Robnett: I move to strike out the answer on the ground it is incompetent, irrelevant and immaterial, not responsive to the question.

Mr. Strong: It is not finished.

The Court: Had you finished your answer?

The Witness: No. [171]

Mr. Robnett: I move to strike out such as he has already said as to his conclusion.

The Court: He says that is what he told him.

Proceed with the answer.

The Witness: Mr. Ormont told me then that he was very sorry to see me go, and roughly two weeks later he called me on the telephone——

The Court: No, just this one conversation, not two weeks from now. Is that all you had to say?

The Witness: In essence, that is all.

Mr. Robnett: I move to strike it out.

The Court: The whole answer may be stricken as not responsive to the question.

Mr. Strong: May I be heard, your Honor?

The Court: I can tell if it is not responsive.

Mr. Strong: If I can tie it up with subsequent conversations?

The Court: It is not responsive to the question.

Q. (By Mr. Strong): On the subsequent occasion, where did the conversation take place?

(Testimony of Ernest Link.)

The Court: That is all you want this witness to talk [173] about?

Mr. Strong: That is right.

A. There have been several conversations.

The Court: The jury is instructed to disregard the answer of the witness to the last question.

The Witness: There have been several discussions and [172] talks.

Q. (By Mr. Strong): Tell us the next one. When was the next one?

A. They were mostly by telephone.

Q. When did it occur?

A. In the interim of the next two weeks, Mr. Ormont called me several times in order to obtain his books.

Q. Did you ever talk to Mr. Ormont on the telephone prior to that occasion? A. Yes.

Q. Did you recognize his voice on the telephone? A. Yes.

Q. Was that Mr. Ormont's voice that spoke to you? A. Yes.

Q. On this occasion? A. Yes.

Q. Go ahead.

A. I told Mr. Ormont that I did not—

The Court: Just a minute. Are you asking for the whole conversation or are you asking him for a conversation concerning the receipt of money other than shown on the books for the years 1942, '43 and '44? That was your question?

Mr. Strong: That is what I want. I am just interested in that.

(Testimony of Ernest Link.)

The Court: If he knows anything about it?

Mr. Strong: That is right.

The Court: Do you understand that?

The Witness: Yes.

The Court: All right.

The Witness: I told him that my answer was still no, that I would prefer not to work for him any more because of his shady operations. In fact, that I had a mind to report him to the Government.

Mr. Robnett: I move to strike that.

The Court: Was that said in the conversation?

The Witness: In that particular conversation; yes.

Mr. Robnett: I move to strike the answer, if the Court please.

The Court: The answer is stricken and the jury is instructed to disregard it.

Q. (By Mr. Strong): Do you understand my question?

A. Will you kindly repeat it?

Mr. Strong: May I have the reporter read it?

The Court: That is the question that was asked quite some time ago.

(The question referred to was read by the reporter as [174] follows:

(“Q. Did you during 1945 have any discussion with the defendant Sam Ormont concerning the collection of sums by him, of any sums by him, in addition to those shown on invoices for the years 1942, '43 or '44?’”)

(Testimony of Ernest Link.)

The Court: That is all the conversation that counsel is asking you about.

The Witness: Yes.

The Court: Whether you had any conversation. You have identified two conversations, one in his office and one on the phone and in neither of which anything was said concerning the receipt of money by him not shown on invoices. Now we are up to here. Go on.

The Witness: Then I received a telephone call from Mr. Ormont to come down to the stockyards and meet him there and turn over the books to him.

Q. (By Mr. Strong): What date was that?

A. About two weeks after I left his services. It could have been a month. I don't know exactly.

Q. Did you go down?

A. Yes, I went there.

The Court: Was that all the conversation?

The Witness: No, I went there and met him and he asked [175] me again to return to his services because it did not look good if I left him just then. He also offered me \$2500 bonus at the end of the year if I would stay, and a monthly accounting fee of \$125.

Q. What about the conversations?

A. Then there was conversation about the black market, in fact I told him that I did not like his way of doing business and I did not like to work for someone who worked in the black market, and his answer was that practically everybody was in the black market these days.

(Testimony of Ernest Link.)

The Court: Is that all the conversation?

The Witness: In essence; yes.

Mr. Robnett: I move to strike it out, your Honor.

The Court: The whole answer may be stricken and the jury instructed to disregard it. The witness has not answered the question. It is not responsive to the question. The question is whether or not you had a conversation with him about the receipt of money that was not shown on the invoices. Did you have any subsequent conversations now?

The Witness: No. The answer would be no then.

The Court: The answer would be no?

The Witness: No.

The Court: You wish to revise your previous testimony in which you said the answer was yes?

The Witness: Yes. [176]

The Court: Very well.

Mr. Strong: You say you are going to recess at 4:30? I think I could speed this up a little if we recessed now. It will take much less time in the morning.

The Court: You move to recess now?

Mr. Strong: Yes, if you don't mind.

The Court: All right. Recess until 10:00 o'clock tomorrow morning. Remember the admonition.

(Whereupon, at 4:25 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Tuesday, May 27, 1947.) [177]

Los Angeles, California, Tuesday, May 27, 1947

10:00 A.M.

The Court: Is it stipulated that the defendants are present in person and by their counsel, and each juror is present and in his or her place?

Mr. Strong: So stipulated.

Mr. Robnett: Yes.

Mr. Katz: So stipulated.

ERNEST LINK

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Strong:

Q. Mr. Link, you testified yesterday regarding some entries which you made on the books at the request of Mr. Ormont. Do you recall that?

A. Yes.

Q. I will ask you whether you at any time saw Mr. Ormont himself make entries on the books, which were not correct? A. Yes.

Mr. Robnett: I object to that as assuming something not in evidence and asking the conclusion of the witness as to their not being correct.

The Court: Yes, I think that is objectionable. The [181] objection will be sustained. Reframe your question.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): Did you ever see Mr. Ormont make any entries on the books and records of the Acme Meat Company, during the years 1942 to 1944? A. Yes.

Q. When was that? A. In 1944?

Q. Approximately what part of the year?

A. In the months of October, November and December.

Q. What entries did you observe him make?

Mr. Katz: That is objected to, if the Court please, on behalf of the defendant Himmelfarb, as not binding upon him in any way, and hearsay as to him.

The Court: The objection will be sustained. I take it, it will not be necessary at each session of the court to renew the understanding had by counsel, that this is offered only presently as against the defendant Ormont?

Mr. Strong: At the present time the understanding is the same.

The Court: Very well.

Mr. Robnett: Thank you, your Honor.

The Witness: May I have the question again?

(Question read by the reporter.)

A. He changed the purchases of livestock, cattle.

Q. (By Mr. Strong): He changed them in what respect?

A. I had to report those according to the invoices which Mr. Ormont had given me for the subsidy program. Then he changed them later on in the office, in my presence. He increased the cost of those cattle.

(Testimony of Ernest Link.)

The Court: How many such entries did you make?

A. For all three months of September, October and November. That was done, as far as my recollection goes, in October, November and December.

Q. How many entries did you make?

A. That was in the subsidy——

Q. How many different times did you write down in the books?

A. On the bills—there were a number of bills, approximately from a half a dozen to a dozen. I couldn't exactly say the exact amount.

Q. Each month? A. No, in total.

Q. From a half a dozen to a dozen?

A. Yes.

Q. Did you change those yourself, or did he change the invoices?

A. He changed the invoices. [183]

Q. From which you copied into the books?

A. Yes.

Q. Is that the same incident you described yesterday? A. Not in detail.

Q. Is it relating to the same? A. Yes.

Q. Those are the same changes that you described yesterday? A. Yes.

Q. (By Mr. Strong): I had asked for any others or additional ones beyond those that you testified to yesterday.

A. I understand I testified yesterday to——

Q. You remember what you testified to yesterday. That is why I prefaced my question. Do you

(Testimony of Ernest Link.)

recall them, or is this in addition to the testimony you gave yesterday—part of the same transaction?

A. It is part of the same transaction.

Q. As far as you know from the books and records, or any other basis of knowledge you may have, was the Acme Meat Company operated on a calendar year basis, or a fiscal year basis during the years 1942, 1943 and 1944?

Mr. Katz: Objected to, if the Court please, as to that question, insofar as the defendant Himmelfarb is concerned——

Mr. Strong: We have agreed as to each question. I have [184] not mentioned his name.

The Court: The objection will be sustained. The jury will receive this evidence as against the defendant Ormont only, and disregard it as to the defendant Himmelfarb.

The Witness: On a calendar year basis.

The Court: It will be assumed that objection will be made to each question, and the same ruling made, as to each one, unless the prosecutor avows that it is offered for connecting the defendant Himmelfarb, or it is obvious from the question that it applies to the defendant Himmelfarb. [185]

Q. (By Mr. Strong): On what basis?

A. On the calendar year basis.

Q. On what basis were the books of the Acme Meat Company kept for the years 1942, '43 and '44?

A. On a calendar year basis.

Mr. Strong: That is all.

The Court: Cross-examine.

No. 11662-11666

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

IN FOUR VOLUMES

VOLUME II

Pages 451 to 888

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

No. 11662-11666

United States
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PHILLIP HIMMELFARB,

Appellant,

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UNITED STATES OF AMERICA,

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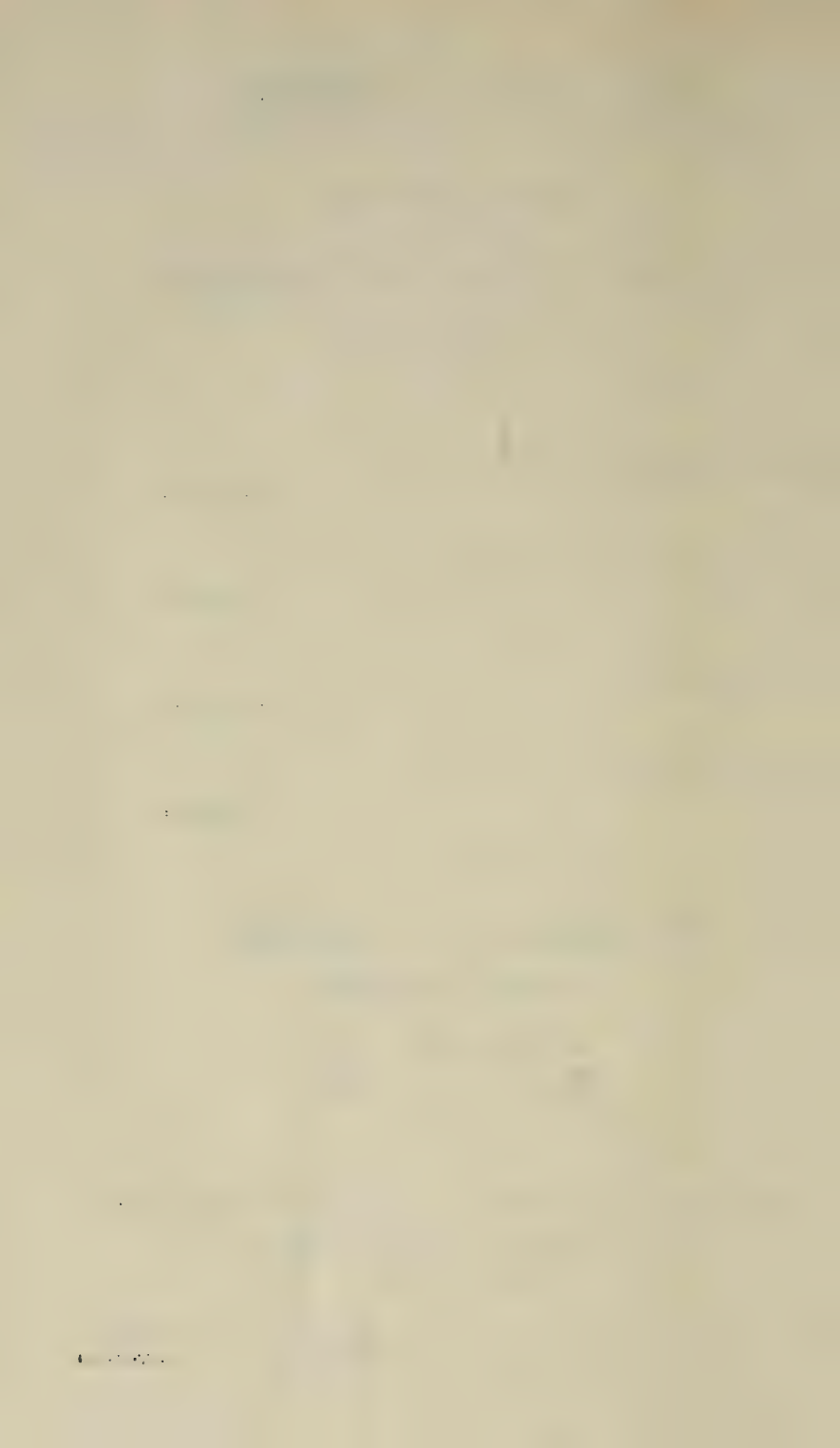
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Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division



(Testimony of Ernest Link.)

Cross-Examination

By Mr. Robnett:

Q. Mr. Link, as I understand, you kept Mr. Ormont's, that is, the Acme Meat Company's, books from sometime in 1931 until the early part of 1945?

Mr. Katz: If the Court please, may I interrupt at this point to say that I interpose an objection to every question that counsel for Mr. Ormont asks and to every answer that is made thereto as not binding upon this defendant; and may the same understanding pertain with respect to the cross-examination as pertains to the direct?

The Court: In other words, you make the objection now to this question?

Mr. Katz: Yes, on behalf of the defendant Himmelfarb.

The Court: And without the necessity of repeating the objection to each question the objection will be sustained.

Mr. Katz: Thank you. [186]

The Court: And it will be deemed to have been made with the same ruling.

Mr. Strong: Does that mean that the answer does not apply to Himmelfarb?

The Court: Unless the answer does apply to Himmelfarb and unless it is obvious from the answer.

Mr. Robnett: Will you read the question?

(The question referred to was read by the reporter as set forth above.)

The Witness: Yes, I did.

(Testimony of Ernest Link.)

Q. (By Mr. Robnett): You are the one who opened up the first set of books for the Acme Meat Company, are you not? A. Yes.

Q. And at the time that you opened them up, if you know, who besides Mr. Ormont was engaged as a party to the books, that is, of the Acme Meat Company?

A. There was one partner, Frank Salter.

Q. And he was there in '31, was he?

A. Yes.

Q. At that time there was a partnership, wasn't there, between Mr. Ormont and Mr. Salter and they did business as the Acme Meat Company?

A. Yes.

Q. Where was their place of business at that time? [187]

A. On the premises of the United Dressed Beef Company at 4360 South Soto Street, Los Angeles.

Q. How long did they continue business at that address?

A. Until approximately 1942 at that address.

Q. I will ask you this, isn't it a fact that they stayed there until August 1943 and in August '43 they moved over to the Harmon Packing Company at 3305 East Vernon Avenue, Vernon, California?

A. They did move there. I may be wrong on the exact date of the moving.

The Court: You say they didn't?

The Witness: They did.

The Court: They did move there?

The Witness: Yes.

(Testimony of Ernest Link.)

Q. (By Mr. Robnett): Now I will ask you also if it isn't a fact that they stayed at that latter address, 3305 East Vernon Avenue, until about May 1, 1944? A. That is not correct.

Q. It is not? A. No.

Q. When did they leave the address at 3305 East Vernon Avenue?

A. The partnership was dissolved before they left there. It is not there any more. It was Sam Ormont alone. [188]

Q. You mean the two of them?

A. That is correct.

Q. When was it that that partnership was dissolved, to your knowledge?

A. To my best recollection, that must have been in 1942.

Q. Do you have anything that fixes your recollection definitely on that?

A. Only the records of the Acme Meat Company.

Q. I am going to ask you if it isn't true that their dissolution was March 31, 1943.

A. Well, I would be wrong by at least three months.

Q. Now is it not your opinion that that was about the time that they dissolved, March 31, 1943?

A. Yes.

Q. Now therefore at that time they were at 3305 East Vernon Avenue? A. Yes.

Q. After that dissolution and on about May 1, 1944, is it not a fact that Mr. Ormont, who was then doing business as Acme Meat Company, moved to

(Testimony of Ernest Link.)

the Southern California Meat Company at 3301 East Vernon Avenue? A. Yes.

Q. Just a door or two from where they had been, wasn't it? [189] A. That is right.

Q. And isn't it also a fact that Mr. Ormont, doing business as Acme Meat Company, moved from 3301 East Vernon Avenue, Vernon, California, on or about January 11, 1945, to Imperial Highway and Garfield Avenue? A. Yes.

The Court: Let me see. Who moved to the Southern California Meat Company?

Mr. Robnett: Ormont.

The Court: In 1943?

Mr. Robnett: 1944, your Honor.

The Court: Then he moved from there to——

Mr. Robnett: Imperial Highway and Garfield Avenue.

Q. Now, Mr. Link, during those years that you were keeping the books for the Acme Meat Company, did you have any assistance or help whatsoever in keeping the books?

A. Outside of vacation periods, where the work would be done by someone else, I think it was once or twice that that occurred in those years, and outside of occasional help from my wife when I was very busy, who would check the bills also with me, outside of that I have done the work alone.

Q. You are a married man? A. Yes.

Q. And your wife did help you at times in connection with the books of the Acme Meat Company?

A. Yes. [190]

(Testimony of Ernest Link.)

Q. And that was during the vacation years, was it?
A. That was in the early years.

Q. Did she help you any in 1942? A. No.

Q. None at all? A. No.

Q. 1943? A. No.

Q. 1944? A. No.

Q. 1945? A. No.

Q. She didn't do a thing on the books during that time?
A. That is right.

Q. Now this particular work you were doing for the Acme Meat Company was merely part-time wasn't it?
A. Yes.

Q. Are you a regular bookkeeper? Were you during those years?

A. Yes, I am a regular bookkeeper.

Q. Were you keeping books for someone else during that same period of time? A. Yes.

Q. Who, for instance?

A. For the Coast Packing Company, for the Harmon [191] Packing Company, for the Vernon Packing Company, for the A. Mueller Packing Company in Norwalk, for the United Dressed Beef Company, for the Pioneer Provision Company, for Aaron & Ben Linnion, and for Ben Ginsberg.

Q. Did you have any full daytime job for any concern during any of the years from '31 to '45?

A. Yes.

Q. When you were keeping books for Mr. Ormont and the Acme Meat Company? A. Yes.

Q. Where did you work in the daytime?

A. At the United Dressed Beef Company.

(Testimony of Ernest Link.)

Q. And that was how many hours a day which you were supposed to devote there?

A. Eight hours.

Q. And you did so, did you? A. Yes.

Q. You did that over a course of years, did you?

A. Oh, yes.

Q. And are you still doing it? Are you still working there? A. No.

Mr. Strong: May we have the years fixed, your Honor?

Mr. Robnett: Yes, I will ask that. [192]

Q. What years did you work for that concern at eight hours a day?

A. From 1931 to 1934, for the United Dressed Beef Company; from 1935 until 1937 for the Vernon Packing Company, and for shorter periods later on for the Coast Packing Company; that was for a month or two during vacation times, I have gone in there and worked for a full day, for a stretch of a month or two months.

Q. During 1942 were you working full time for any concern?

A. I believe I was working at that time for two or three months for the Coast Packing Company.

Q. Do you remember what months they were?

A. It was in the summer months; possibly June, July and August.

Q. During the other months of that year did you work for anyone full time? A. In 1942?

Q. '42.

A. To the best of my knowledge, no.

(Testimony of Ernest Link.)

Q. Did you, during 1942, divide your daytime among various persons or companies that you have named that you were working for, other than the Acme Meat Company?

A. No, I would do the work for the Acme Meat Company at the week end. [193]

Q. That was the only time you worked for the Acme Meat Company, was it?

A. Sometimes it is possible that I would take some bills of the Acme Meat Company home, and figure them in the evening, after my day's work at the Coast Packing Company; but, as a rule, most of the work was done on Saturday and Sunday.

Q. Where was it done? A. At my home.

Q. In order to do that you had to have the books and data there, didn't you? A. Yes.

Q. You got them, I assume from the Acme Meat Company's office? A. Yes.

Q. What would you get, to take home?

A. The invoices, the sales invoices; the ledger I kept at home; the accounts receivable ledger, and I would get the check book and bring that up to date, and the check record.

Q. The ledger you kept home all the time, did you? A. Yes.

Q. Where did you keep the invoices after they had been entered?

A. I would collect the invoices until I got a sufficient number together to make a package, and then turned that [194] over to Mr. Ormont, taking them to his plant, at intervals perhaps six months.

(Testimony of Ernest Link.)

Q. During the accumulation of those invoices, which was about a six months' period, you would keep them at home, would you? A. Yes.

Q. Would you pick up invoices every week end?

A. I would either pick them up, or Mr. Ormont's partner, or himself, would bring them on his way home to my house.

Q. Frequently they were brought over then?

A. Yes.

Q. On occasions, when they were brought to you, you did not go to the office of the Acme Meat Company during the week or week end?

A. That is correct.

Q. Did you keep any of the other records at your home, for any period like six months, or anything of that sort, other than the ledger and the invoices?

A. My accounting forms, on which I figured profit and loss calculations every month, I would keep at home.

Q. The only time then that you worked on these books of the Acme Meat Company was Saturday and Sunday, and possibly once in awhile in the evening? A. Yes.

Q. And all that work was done in your home?

A. Yes. Pardon me. May I make one correction?

Q. Yes.

A. It was occasionally that I was waiting for some of the books to be finished, and I may have, once in awhile, put in a half hour's work on those bills in his office.

(Testimony of Ernest Link.)

Q. Aside from those periods you have mentioned, and the times when you would go to pick up the records, those were the only times that you went to the office of the Acme Meat Company, is that right?

A. Not exactly. Since I worked in Vernon, sometimes I would drop in.

Q. You would drop into the office?

A. I would drop into the office, because I was so close to the office. I was next door.

Q. But, generally speaking, you were seldom in there, except when you went to get the books, is that correct?

A. Yes.

Q. When you would go to get the books, where would you find them?

A. In the office of the Acme Meat Company.

Q. And where would you find the invoices?

A. In the office of the Acme Meat Company.

Q. When you got those invoices, did you get the invoices that were in the charge accounts? That is, that the cash had not accompanied them? [196]

A. I got the invoices for the charge accounts as well as the cash sales.

Q. You got both kind?

A. Yes, and the deposit slips.

Q. You got the deposit slips for the Acme Meat Company bank account?

A. Yes.

Q. You say you would take the check book with you, and check the books of the Acme Meat Company so that you could enter your cash matters or transactions in the books or the ledger?

A. Yes.

(Testimony of Ernest Link.)

Q. You would retain those over the week end, would you? A. Yes.

Q. When would you return those to the Acme Meat Company's office?

A. As a rule, on Monday mornings, when I would go to work in Vernon.

Q. Were there times when you did not return them on Monday mornings?

A. Occasionally they have been returned over Sunday, perhaps to Mr. Ormont's home.

Q. Were there any times when you had those check books in your possession, and at your home, more than a week end?

A. I don't recall that. [197]

Q. Would you always be able to bring the books up to date over Saturday and Sunday?

A. To the best of my memory, yes.

Q. You don't think you ever had to work on them on Monday or Tuesday of any week?

A. On Monday and Tuesday he needed them badly, the check book especially, for his livestock purchases.

Q. I understand he did, but I asked you if you ever had them on Monday or Tuesday.

A. I don't remember that.

Q. You would not say that you did not, at times, would you? A. I don't really remember.

Q. During all of these years you, and you alone, were in full charge of Mr. Ormont—of the Acme Meat Company, I should say—the Acme Meat Company's books and records, were you not, and kept them?

(Testimony of Ernest Link.)

A. No, during those vacation periods, which one time was a period of six months, five months, someone else was in complete charge.

Q. What year was that that you were gone five or six months? A. 1939.

Q. Where were you? A. In Germany.

Q. Do you remember the months?

A. From April until November.

Q. And during that period, of course, you did not have the books, and did not keep them?

A. No.

Q. Do you know who did? Do you know the man?

Mr. Strong: I haven't objected before, but 1939 is three years before the dates of the indictment.

Mr. Robnett: I will withdraw the question.

Q. Did you take a vacation any other time, during the period from 1931 to 1945? A. Yes.

Q. What years did you take vacations?

A. My mother suffered a paralytic stroke in 1934, and I received a telegram from Europe to come quickly and see her, and I took an eight weeks' vacation to see her.

Q. That wasn't very much of a vacation, was it?

A. It was a fast trip, back and forth.

Q. Did you take any other vacations in any other years, as vacations are commonly used?

A. I took vacations, but they would not affect the Acme Meat Company, inasmuch as I could do that work still over the week end.

The Court: In other words, in 1939 you did all the books? [199] A. Yes.

(Testimony of Ernest Link.)

Q. When you did take a vacation, you kept up on it when you came back? A. Yes.

Q. After 1939, no one had anything to do with keeping the books, except you?

A. To the best of my knoweldge, yes.

Q. You would have known it, at the time, wouldn't you?

A. Those are such small details to me in my work.

Q. The Acme Meat Company—in going over their books, didn't you check them to see if there were entries made in there by somebody else, you did not know anything about?

A. Yes, I would see them. [200]

The Court: Well, they were made by you?

The Witness: Yes.

The Court: They were all made by you?

The Witness: Yes.

The Court: So your answer is that you kept the books after 1939?

The Witness: Yes.

Q. (By Mr. Robnett): Most of your work seems to have been for packers or meat companies, is that correct? A. Yes.

Q. Mr. Link, through your experience in that regard did you learn anything about the manner of grading cattle, or whether they were or were not graded? A. Yes.

Q. You did learn that? A. Yes.

Q. You learned that cattle were classified into different grades, or that the carcass was after the same was slaughtered? A. Yes.

(Testimony of Ernest Link.)

Mr. Strong: I object to that. I don't see what this has to do with the case. This relates to income.

The Court: Objection overruled.

The Witness: Yes. [201]

The Court: Were they rated before they were slaughtered as well as after?

The Witness: They were rated during the war after they were slaughtered.

The Court: Not before?

The Witness: Not before slaughter before the war.

The Court: No, before slaughter. In other words, an old cow wouldn't be graded the same as a nice young fat steer before it was slaughtered?

The Witness: Not to my knowledge, but I am not familiar with the livestock end of the business.

The Court: I see.

Q. (By Mr. Robnett): Do you know what grades the Government used as to beef, that is, what they classify them as?

The Court: You mean killed beef?

Mr. Robnett: Yes, the carcass.

The Witness: AA, A, B, C.

Q. (By Mr. Robnett): You stated——

The Court: Had you finished?

The Witness: Cutters and canners.

Q. (By Mr. Robnett): You started with the higher grade, I take it, AA is the highest grade?

A. That is right.

Q. When we speak of the grading, that was a United States Medal A grading? A. Yes.

(Testimony of Ernest Link.)

Q. During your experience at the Acme Meat Company, the beef and the carcasses were graded to your knowledge, were they not, by the Government? A. Yes.

Q. And isn't it a fact to your own knowledge that Mr. Ormont, doing business as the Acme Meat Company, was doing business under a license from the United States Government as a packer or slaughterer?

A. Yes, as a customs slaughterer.

Q. I beg your pardon?

A. As a customs slaughterer.

Mr. Strong: Of course, your Honor, I think the license is the best evidence. As a matter of fact, I don't know whether the United States Government issues licenses to slaughterers or not. I have never seen one.

The Court: If it becomes material the license will be produced.

Q. (By Mr. Robnett): Mr. Link, during all those years that you were the bookkeeper for the Acme Meat Company, both while Mr. Ormont and Mr. Salter were co-partners, and likewise after Mr. Salter [203] retired and Mr. Ormont then conducted the business under that fictitious name, you made out the income report for Mr. Ormont, did you?

Mr. Strong: Objected to on the ground that income report may mean a dozen different things. If it is income tax returns, that is one thing; if it is information for some government agency, it is something else.

(Testimony of Ernest Link.)

The Court: Do you object on the ground it is indefinite and uncertain?

Mr. Strong: Yes.

Mr. Robnett: I will reframe the question.

Q. I mean the income tax reports that were made out, you made them out for each year, did you not? A. Yes.

Q. And in doing so you made them out from the books which you had kept, didn't you?

A. Yes, plus information which I received from the partners.

Q. Now yesterday I believe you identified on the income report that you made out for Mr. Ormont for 1944 a figure of \$1375 interest on bonds, that that was information that was voluntarily given you by Mr. Ormont, you said, for that year?

A. Yes.

Q. I also ask you now—let me have those (the documents [204] referred to were passed to counsel)—to examine Government's Exhibit No. 1, which is an individual income tax return for 1942, for the calendar year, for Sam Ormont—it is a photostatic copy, I should say—and I wish *you see whether or not there is any entry there of interest, whether it is on bonds or otherwise, but under that line that is given there.*

A. Yes, there is an interest on bank deposits and notes in the amount of \$1299.75.

Q. And you entered that on there, didn't you, that is, on the original?

A. (Pause)

(Testimony of Ernest Link.)

Q. When you made out that report you entered that on it, didn't you?

A. I may perhaps, before giving the answer, say that I gave the originals which I made out to Mr. Ormont who would then send them in. I did not send them in to the Government.

Q. I am not asking you that——

The Court: That isn't the question. The question is whether you entered that figure on that document, or the document of which that is a photostat.

The Witness: From this photostat it will be difficult for me to exactly state whether that is written by my typewriter.

The Court: If that is a true and correct copy of the return, then wouldn't you say that it was written by you? [205]

The Witness: Yes.

Q. (By Mr. Robnett): Where did you get the information for that item?

A. From the records available and from Mr. Ormont's information.

Q. Did you have in the Acme Meat Company records anything concerning that item?

A. There was in the Acme Meat Company records an income from interest which was charged to the business of the partnership, because Mr. Ormont advanced money to the partnership and drew interest on this advanced money.

Q. Is it your answer then that that could embrace some of that? A. It could.

Q. From those books, I mean?

A. Yes, it could.

(Testimony of Ernest Link.)

Q. Didn't Mr. Ormont tell you that same year of the item of interest that he has in there, or that you have placed in there, didn't he tell you that he had received that interest from sources?

A. As best I remember, he told me that he received some interest from a loan which he had made to an outsider, I believe on a citrus ranch.

Q. Now, by the way, when you testified as to being the sole bookkeeper and the one who kept all the records, you are [206] speaking only of the records of the Acme Meat Company as such, aren't you?

A. Yes.

Q. You did not keep any private books for Mr. Ormont in any other line of business, did you?

A. No.

Q. You just kept the Acme Meat Company records?

A. That is right.

Q. And when you checked check books that you have spoken of, they were the Acme Meat Company check books, weren't they?

A. Yes.

Q. And you did not use or have available for use, and didn't post, any items from Mr. Ormont's own bank accounts, if he had any?

Mr. Strong: Objected to on the ground there is no evidence that there were any other books.

The Court: Objection overruled. He said, if he had any.

The Witness: No.

Q. (By Mr. Robnett): Now will you look also—I believe I handed you an other exhibit—I show you Government's Exhibit 2, which is Sam Or-

(Testimony of Ernest Link.)

mont's individual income and Victory tax return for 1943, a photostatic certified copy, and I will ask you to [207] examine that and see whether or not there is any item there of interest on anything.

A. Yes, there is.

Q. In what amount? A. \$387.50.

Q. Is it not a fact that Mr. Ormont gave you that information that he had received that interest and for you to account for it on his income?

A. Yes.

Q. Now with each and every return, income tax return that you made for Mr. Ormont, as an experienced accountant and bookkeeper, I want you to tell the jury whether or not those returns, in your opinion, were correctly made out.

A. As a bookkeeper, yes. I am not an accountant.

Q. You are not an accountant? A. No.

Q. It is true, is it not, that Mr. Ormont left it to you entirely as to the manner in which you kept the books? A. Yes.

Q. Now you have testified——

The Court: Pardon me, before you get off of that subject. Each of those income tax returns that are in evidence here, you made out, I understand that to be your testimony?

The Witness: Yes.

The Court: I understand it also to be your testimony [208] that you made them out accurately?

The Witness: Yes.

The Court: That you reported all of the income, that you knew that Mr. Ormont had, and reflected by the books, and made only the deductions that were true and correct, according to your information?

The Witness: Not for the year 1944.

The Court: Not for the year 1944?

The Witness: This is 1942 and '43.

The Court: You have 1944 there, or who has it?

Mr. Robnett: That is Exhibit No. 3, Your Honor.

(The document referred to was passed to the witness.)

The Court: Now my question is, you made that out?

The Witness: I made this return out; yes.

The Court: And you made it out truly and correctly, according to the records in the books?

The Witness: Yes.

The Court: And the information Mr. Ormont gave you?

The Witness: Yes.

The Court: Did you know at that time, or did you have any reason to believe that you were making a false return?

The Witness: Yes.

The Court: You knew it was a false return?

The Witness: Yes.

The Court: When you made it out? [209]

The Witness: Yes.

Q. (By Mr. Robnett): Mr. Link, have you in this case or any matter connected with Mr. Ormont acted as an informer to the Government?

(Testimony of Ernest Link.)

Mr. Strong: I object. I think it would be clearer to the jury and everybody if he stated what he did rather than characterize it.

The Court: Counsel has a right to cross examine him. It goes to the credibility and bias and prejudice of the witness. Objection overruled.

The Witness: Mr. Ormont's records were examined——

The Court: No. Just a moment. You can answer that question yes or no.

The Witness: Yes.

Q. (By Mr. Robnett): And as such have you been promised any compensation? A. No.

Q. Have you been promised any immunity from prosecution for making out a false and fraudulent return that you have just testified you did?

A. No.

The Court: Mr. Link, are you aware of the statutory provisions for what is called moiety?

The Witness: No.

The Court: Do you know what moiety is? [210]

The Witness: No.

The Court: Are you aware of the statutory provisions which enables the Government to pay to an informer a certain percentage of the tax return when and if it is recovered?

The Witness: No. It is the first time I hear of it.

Mr. Strong: Me too.

Q. (By Mr. Robnett): Mr. Link, you testified yesterday that certain changes, entries in the books

(Testimony of Ernest Link.)

were changed, some of the records of the Acme Meat Company, by you I believe, was that correct?

A. Yes.

The Court: By the way, I understand your answer about you knew that it was a false return, that that applied only to 1944?

The Witness: Yes.

The Court: It did not apply to 1942 and 1943?

The Witness: That is right.

The Court: And I understand from your testimony that it was false to the extent of \$3000?

The Witness: Yes.

The Court: And \$3000 only?

The Witness: Yes.

Q. (By Mr. Robnett): And that is the \$3000 that you mentioned yesterday, is it, in your testimony as to the changed entries on the [211] books of the Acme Meat Company?

A. It is about that amount.

The Court: About it?

The Witness: Yes.

The Court: That was a recorded increase in the amount of money paid for the purchase of cattle?

The Witness: That is right.

The Court: Which you made as an additional deduction?

The Witness: Yes.

Q. (By Mr. Robnett): When you were working for the Acme Meat Company were you acquainted with Roy Mills, and/or Roy Mills & Son?

The Court: Is that a firm name?

(Testimony of Ernest Link.)

Mr. Robnett: Yes, I believe it is a firm name, your Honor.

The Witness: Only through the books. I don't know the man personally.

Q. (By Mr. Robnett): But you did have some items on the books in connection with Roy Mills & Son or Roy Mills himself, did you? A. Yes.

Q. And when you yesterday referred to certain changed items where you said that on Mr. Ormont's behest you increased the cost of certain beef on the books and on maybe some invoices——[212]

A. Not on th invoices.

Q. But on some books?

A. On the records.

Q. What particular record was that?

A. The subsidy program record.

Q. You did not increase it in the books of account themselves? A. Mr. Ormont did.

Q. He did that?

A. He made a check out for it.

The Court: He made what?

The Witness: He made the check out for that increased amount.

The Court: He actually paid the additional money?

The Witness: He paid the additional money with a check which was drawn.

The Court: He paid the additional \$3000?

The Witness: Yes.

The Court: So that the books were accurate when it said that he spent \$3000 more?

(Testimony of Ernest Link.)

The Witness: This change I cannot recollect exactly, whether it was made late in '44 or the beginning of 1945, but it was a check drawn to pay a personal check which Mr. Ormont had drawn out of his personal account, he told me.

The Court: That check went through and was paid? [213]

The Witness: I do not always check the endorsements.

The Court: Well, somebody got it. I mean to say, you check each month to see if the checks are cashed?

The Witness: If they are not cashed they are carried forward on an outstanding check list.

The Court: That is a rather large sum. Do you think that it would go through?

The Witness: For a firm that does a great deal of business, you always have a certain number of checks which are not returned.

The Court: Let me see if I understand your testimony. Do you want me to understand your testimony is that you don't know whether that check was ever cashed?

The Witness: That is right.

The Court: Do you mean you did check your books to see if it was cashed?

The Witness: I had no interest to check whether it was cashed or not.

The Court: But it was your duty to keep the books?

The Witness: Yes.

(Testimony of Ernest Link.)

The Court: To see that they were in balance?

The Witness: They will be in balance either way.

Th Court: Would your books be in balance if there is an outstanding check?

The Witness.: It would be taken up by the reconciliation [214] of the bank statement, and listed as an outstanding check if it hasn't cleared. [215]

Q. Up to the time you left that was still outstanding, or you don't know?

A. That I don't remember.

The Court: We will take a short recess. Remember the admonition, ladies and gentlemen.

(Short recess.)

The Court: Is there the usual stipulation?

Mr. Strong: So stipulated, your Honor.

Mr. Katz: So stipulated.

Q. (By Mr. Robnett): Mr. Link, the items that you have referred to as \$3,000 items, which you say Mr. Ormont placed some of the figures on the books, and that you changed certain documents in connection therewith, isn't it true that those items were with respect to cattle that had been purchased from Roy Mills & Son? A. Yes.

Q. And they were all respecting those items?

A. Yes.

Q. At the time Mr. Ormont asked you to make those changes, didn't he tell you that when he bought those cattle from Mr. Mills, or Mills & Son, that he had bought them under the understanding that he would pay a given price at that time, and if

(Testimony of Ernest Link.)

and when the cattle were slaughtered the Government had graded them at a higher grade, that he would increase the [216] price to Mr. Mills? Didn't he tell you that? A. No.

Q. Didn't he mention anything of that sort to you? A. No.

Q. Not a word? Not a word of that?

A. No.

Mr. Robnett: I would like to have these three items marked for identification. I think they had better be separated, according to their dates.

The Clerk: B, C and D. Exhibit B, dated September 30, 1944; Exhibit C dated October 31, 1944; Exhibit D, dated November 30, 1944.

(The documents referred to were marked Defendants' Exhibits B, C and D for identification.)

Q. (By Mr. Robnett): I will ask you if, at the time he asked you to make those corrections, if he didn't also tell you that he, out of his personal checking account, had issued checks to Roy Mills & Son for the differential, or the increased amount that these cattle graded, and that he wanted you to enter on the books the total amount of those items, and he would take a check back to himself from the Acme Meat Company for the aggregate of those checks?

A. He told me that he would do that.

Mr. Robnett: I will ask the clerk to kindly mark this [217] Defendants' Exhibit next in order for identification.

(Testimony of Ernest Link.)

The Clerk: Exhibit E, check dated September 29, 1944.

(The document referred to was marked Defendants' Exhibit E for identification.)

Q. (By Mr. Robnett): Mr. Link, I am going to first show you Defendants' Exhibit B for identification, and ask you to examine that. I now show you Exhibit C for identification, and ask you to examine that; and I will show you Exhibit D for identification, and ask you to examine that. I will show you Exhibit E for identification, and ask you to examine that. I am going to hand you a piece of blank paper and a pencil, and ask you to kindly take the amount of Exhibits B, C and D off of those items, and add them.

Mr. Strong: I object upon the ground that no foundation has been laid for these checks. They are not in evidence. We don't know anything about them.

The Court: Haven't you seen them?

Mr. Strong: I have seen them. I don't know where they came from.

The Court: Objection overruled.

Mr. Strong: No proper foundation has been laid, your Honor. He is taking figures and making testimony out of them.

The Court: Objection overruled.

Mr. Robnett: You may retain the papers: I would like my [218] pencil. Thank you.

(Testimony of Ernest Link.)

Q. Now, I will ask you, Mr. Link, if at the time Mr. Ormont asked you to make the changes that you have testified you did make in some documents of the Acme Meat Company, if he didn't show you Defendants' Exhibits B, C and D for identification, which I have just had you examine?

A. No, he did not. [219]

Q. Did he tell you that he had issued similar items to those checks that I have just called your attention to?

A. He told me that he would issue them.

Q. You are sure he used the word "would", are you?

A. Yes.

The Court: Your first conversation with him was in October, is that right? I understood your testimony yesterday concerning these matters that it was in October.

The Witness: Yes, sir.

The Court: So you had more than one conversation with him about these?

The Witness: Yes.

Q. (By Mr. Robnett): Well, at any conversation did he not tell you that he had issued checks to cover the amounts he was asking you to increase the cost of the cattle from Roy Mills & Son?

A. Only in December did he tell me that he would issue those.

Q. That was in December of '44?

A. To my best knowledge; yes.

Q. Isn't it a fact that the only time that he talked to you about making those changes was in December 1944?

A. Yes.

(Testimony of Ernest Link.)

Q. That was after all of the items of increase had been taken care of by him, was it not? [220]

A. I don't understand what you mean by had been taken care of.

Q. I mean that all of the checks that I have shown you were all dated before that, weren't they?

Mr. Strong: I will object to that. The witness testified in the future, not in the past.

The Court: Objection overruled. He said the checks I have shown you were all dated before that.

Mr. Robnett: You may look at the checks again.

(The documents referred to were passed to the witness.)

The Witness: He told me in December that he would write these checks and pre-date them.

Q. (By Mr. Robnett): He told you he would write them and pre-date them, did he?

A. Yes.

Q. And he told you also, did he not, that at that time he was going to take a check from the Acme Meat Company account, made payable to him, for the aggregate of these three checks, Exhibits B, C and D for identification? A. Yes.

Q. Now was that not on or about the 20th day of December 1944?

A. It was some time in December. I don't know when.

Q. I show you Exhibit E for identification and ask you [221] if that refreshes your memory as to when it was.

(Testimony of Ernest Link.)

A. (Examining document) Well, the check carries the date of the 20th of December.

Q. 1944? A. Yes.

The Court: Does that refresh your recollection about the date?

The Witness: Only as far as December is concerned, but not the date.

Q. (By Mr. Robnett): That Exhibit E—please look at Exhibit E—I will ask you if that is not for the identical amount that you have just calculated was the total of Exhibits B, C and D.

Mr. Strong: Objected to on the ground there is no proper foundation laid, and he is getting the substance of the checks in evidence without having properly shown what they are.

The Court: The objection is overruled.

The Witness: It is the identical amount.

Mr. Robnett: I now at this time, if the court please, offer in evidence Defendant's Exhibits B, C and D.

Mr. Strong: Objected to on the ground there is no proper foundation laid.

The Court: Let me see them.

(The documents referred to were passed to the court.) [222]

Mr. Robnett: And I also offer E.

The Court: Did you ever see these checks before?

The Witness: No.

The Court: Do they bear any indication on them that you have checked them against the bank book?

The Witness: No.

(Testimony of Ernest Link.)

The Court: You know you have never seen them?

The Witness: That is right.

The Court: Did you in 1945 audit his bank statement?

The Witness: Those are personal checks. I never had anything to do with them.

The Court: Did you ever see Exhibit E?

The Witness: It is possible that in making my bank reconciliation for the month of December, 1944, it is probable that I saw this check.

The Court: Would you recognize the signature on those as the signature of Sam Ormont?

The Witness (Examining documents): Yes.

The Court: The objection is overruled. The documents are admitted in evidence.

(The documents referred to were received in evidence and marked Defendant's Exhibits B, C, D & E.)

Mr. Robnett: Your Honor, I don't know what your rule is about when they may show these to the jury, and I don't want to violate any rule. [223]

The Court: Whenever they are in evidence you may offer them and show them at that time. Either side may do so. However, it is a matter that I exercise with discretion according to the document. If the document is a long one and will take too long to read, you had better send it up at another time.

Mr. Robnett: I want to ask one or two questions and then I would like at that time to pass them to the jury, if it is agreeable to your Honor, and there is just one or two more questions.

(Testimony of Ernest Link.)

The Court: I think probably they could all go up together at the conclusion of the trial.

Mr. Robnett: Very well then.

The Court: What is the amount of the check, E?

The Clerk: \$3,682.

Q. (By Mr. Robnett): And that is the amount you calculated on this paper, isn't it? A. Yes.

Mr. Robnett: I offer this in evidence as our next exhibit, the calculation made by the witness of the checks.

The Court: Exhibit F. Admitted.

(The document referred to was received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Robnett): Mr. Link, referring now to Exhibit [224] B for the defendant which is in evidence, being a check for \$1,932, payable to Roy Mills & Son, and showing the stamp on the back, the stamp of the bank, and stamped Paid through it by perforation, I will ask you if that amount of that check is not exactly the amount of one of the changes that you were requested to make and did make on the cost of the cattle from Roy Mills & Son.

A. Yes, I believe it is.

Q. I will ask you to examine Exhibit C for the defendant, which is a check for \$1300, made payable to Roy Mills & Son, and stamped Paid as the other check was and with bank stamps on the back, and ask you if that is not the exact amount of one of the items that you were asked to change as to the cost of cattle from Roy Mills & Son.

A. Yes, sir.

(Testimony of Ernest Link.)

Mr. Strong: Objected to on the ground that the books are the best evidence.

The Court: Objection overruled.

Q. (By Mr. Robnett): I will ask you, as to Exhibit D, which is a check for \$450——

The Court: This is cross-examination, and you have touched upon the changes he made in your direct examination.

Mr. Strong: Not as to the check, your Honor.

The Court: As to the amounts. That opened the door. [225]

Q. (By Mr. Robnett): It is a check dated November 30, 1944, for \$450, to Roy Mills & Son, signed by Sam Ormont, and has the stamp Paid by the bank on the back thereof and perforated through it. I will ask you if that is not the exact amount of one of the changes that you were asked to make as to the increase in cost of cattle purchased from Roy Mills & Son by the Acme Meat Company.

A. (Pause)

Q. Do you understand the question?

A. Yes. I was only looking for the endorsement.

Q. I am asking you only as to the amount.

A. Yes.

Q. Now do I understand you to say, Mr. Link, that Mr. Ormont never at any time told you that the reason for the increased cost of those cattle was because of the grading of the beef by the government after they were slaughtered into a higher

(Testimony of Ernest Link.)

grade than the price that he had paid for them on the hoof? Did he ever tell you that?

A. There was a discussion about it, but not in those words.

The Court: What was the discussion?

The Witness: He discussed with me the ways of making out checks to pay for added costs to the purchases which had been entered in the books from previous bills concerning the purchases of Roy Mills. [226]

Q. He did tell you, did he not, that the increase was because of the higher grade of these cattle after they were butchered—higher grades by the U. S. Government? Didn't he tell you that?

A. No.

Q. Never?

A. No, not in those words.

The Court: Did he tell you that in substance? Did he convey that idea to you in some other words?

The Witness: Yes.

Mr. Robnett: I am going to have this document marked next exhibit, please.

The Clerk: G for identification.

(The document referred to was marked as Defendants' Exhibit G for identification.)

Q. (By Mr. Robnett): I now show you Defendants' Exhibit G for identification, Mr. Link, and ask you to examine that, and tell me whether or not that was prepared by you?

A. That was made by myself.

(Testimony of Ernest Link.)

Q. And the handwriting thereon is your handwriting, is it? A. Yes.

Q. And all that, that is, both in lead pencil, and that that is in red, was written by you, was it? [227]

A. Yes.

The Court: Except the letter G? That was written by the clerk? A. Yes.

Mr. Robnett: Yes. Pardon me.

A. That's right. I am sorry.

Q. I will ask you to look at that instrument. I would like to offer it in evidence first, if the Court please.

The Court: Let me see it.

Mr. Strong: I don't know what it purports to show. It may be immaterial and irrelevant.

Mr. Robnett: I don't think it is.

Mr. Strong: That's an opinion.

The Court: That was made in connection with the business of the Acme Meat Company?

A. Yes.

The Court: It is admitted.

(The document referred to was marked Defendants' Exhibit G and was received in evidence.)

Mr. Strong: May we have the record show when it was made, at least, your Honor?

The Court: Yes. When did you make it? Do you remember?

The Witness: In the months of October, November and December, 1944.

(Testimony of Ernest Link.)

Q. (By Mr. Robnett): Look at it, and maybe you can tell better. [228]

The Court: Which month?

The Witness: November, 1944.

The Court: You made it in November or December?

The Witness: Possibly in December. Probably in December, because this concerns the activities of November, which would be calculated at the end of November and the beginning of December.

The Court: All right.

Q. (By Mr. Robnett): I will ask you to look at this particular item under Recapitulation, an item of 450, with a red circle around it, and opposite which are the words: To be added to Roy Mills bills for graded purchases as per orders of Sam Ormont, 12-9-44. You wrote that, didn't you?

A. Yes.

Q. You got that information about the grading from Mr. Ormont, and that was the reason for that to be so added, did you not?

A. Not with regard to the grading.

Q. Where did you get the information that you put down there: To be added to Roy Mills bills for graded purchases?

A. Those are words that Mr. Ormont told me that that was to be added to these bills.

Q. And didn't he tell you further at that time that the reason they were to be so added was because that had been his [229] understanding with Roy Mills & Son when he was purchasing the cattle?

A. No.

(Testimony of Ernest Link.)

Q. He didn't tell you that? A. No.

Q. And that item of four hundred and fifty dollars, I will ask you if that isn't the identical item covered by Defendants' Exhibit D, the check of November 30, 1944, to Roy Mills & Son for \$450? I will ask you if that is not the identical item I have just asked you about on this Exhibit G?

A. Yes.

Q. It is? A. It is.

Mr. Robnett: I would like to have this marked for identification.

The Clerk: H.

(The document referred to was marked Defendants' Exhibit H for identification.)

Q. (By Mr. Robnett): Now, passing to this next exhibit, Mr. Link, I will show you Exhibit E, which you have said was the aggregate of the Exhibits B, C and D, that is, Mr. Ormont's personal checks. A. Yes.

Q. This is the Acme Meat Company's check for \$3682? A. Yes. [230]

Q. Dated December 12, 1944? A. Yes.

Q. I will ask you now if that is not the amount that you had in mind when you said that the books were changed, and that the amount was somewhere around \$3000? I will ask you if the amount was not exactly \$3682? A. Yes.

Q. As represented by this transaction?

A. Yes.

The Court: No other changes in the books?

(Testimony of Ernest Link.)

The Witness: No other changes.

The Court: For the year 1944, in the books?

The Witness: That's right. I will have to change my answer to that.

The Court: Yes.

The Witness: There had been the invoices made by Mr. Ormont to take the place of invoices which he had there to cover these last purchases.

The Court: To cover these particular purchases?

The Witness: To cover these particular purchases.

The Court: In other words, there were no changes relating to any other matters, though?

The Witness: No.

Q. (By Mr. Robnett): Mr. Link, isn't it a fact that there were other [231] changes, and those changes, instead of being increases were decreases in the cost of cattle, and that you made one on Exhibit G, whereby you put it down as a credit for bruised beef, \$45.49? I will ask you to examine that in red.

A. Yes.

Q. That change was also made on the books by you, and that was a decrease?

A. That was part of the whole transaction of changes.

Q. You did not mention it before, that there was a decrease ever? They were all increases? This one had escaped you, had it?

A. No, it had not escaped me, but I answered your question, I believe.

(Testimony of Ernest Link.)

Q. In any event, that one I have just shown you was not the only one that were decreases in the cost of cattle, was it, and that those changes were made after they had found that the beef was bruised?

A. There were small decreases made.

Q. But there were some?

A. There were some decreases.

The Court: Changes that were found after the beef was what?

Mr. Robnett: Slaughtered, and they found it to be bruised.

The Court: What? [232]

Mr. Robnett: Bruised meat, your Honor. It is so written on here.

The Court: I understand.

Q. (By Mr. Robnett): The transactions you have just testified concerning with regard to all of these exhibits and the increase of the price of these cattle purchased by Roy Mills & Son, those were the items and transactions that you testified to a while ago? A. Yes.

Q. As making the 1944, as you say that it made the 1944, income tax return false, is that correct?

A. Yes.

Q. And those are the only items, aren't they?

A. In 1944, yes.

Q. The other 13 years that you worked for Mr. Ormont and made out his income tax returns, '31 through '43—that will be 12 years, we will say—every return that you made was correct and according to your belief, wasn't it?

A. To the best of my knowledge; yes.

(Testimony of Ernest Link.)

Q. I am now going to show you Exhibit H for identification and ask you to examine that and tell me whether or not you prepared that. I have shown this to you, counsel.

Mr. Strong: Yes, I have seen it.

The Witness (Examining document): Yes.

Q. (By Mr. Robnett): The portion that is in handwriting is in your handwriting? [234]

A. Yes, sir.

Q. And you prepared the typewritten portion?

A. Yes, sir.

Q. And that is dated, it says "Profit and Loss Statement for Above Location, April to December 31, 1944?"

A. Yes.

Q. And "Acme Meat Company, 3301 East Vernon Avenue, Los Angeles"?

A. Yes. And it has the addition of the period in handwriting for the period preceding that one in 1944 at the previous location.

Q. In other words, it covers the entire 12-month period of 1944, does it?

A. Yes.

Mr. Robnett: I will now offer it in evidence, if the Court please, after taking off a pencil mark that I had put on.

Q. You hadn't put that there?

A. No.

Mr. Strong: Before he does, may I ask the witness some questions about? I don't know whether it is relevant or material here.

(Testimony of Ernest Link.)

The Court: No. You can cross-examine him about it. He has laid sufficient foundation to admit it in evidence, and it is admitted as Defendant's Exhibit H. [235]

(The document referred to was received in evidence and marked as Defendant's Exhibit H.)

Q. (By Mr. Robnett): Now I will ask you, Mr. Link, to examine the upper portion of this document under sales and then right immediately below that you have "less purchases, net after deduction of subsidies and closing inventory," you have the figure \$321,913.71, is that correct? A. Yes.

Q. I ask you if it isn't a fact that that item includes the item you have just testified concerning with respect to these various checks, namely—if that does not include as a part of the purchases the sum of \$3682 as a part of the cost of cattle.

A. Yes.

Q. And that you took from the books of the Acme Meat Company to make the statement you have in your hand? A. Yes.

Q. Now, Mr. Link, when did you cease working for the Acme Meat Company?

A. In 1945; in April 1945.

Q. Do you remember the exact date?

A. Around the middle of the month.

Q. And prior to that time, isn't it a fact, to your knowledge, that Mr. Ormont, conducting the Acme Meat Company, [236] had employed a full-time bookkeeper? A. Yes.

(Testimony of Ernest Link.)

Q. That was Mr. Sam Berlin, was it not?

A. Yes.

Q. That was before you quit? A. Yes.

Q. Now isn't it true that during the early part of '45 you retained in your possession for some days and days, many days, the invoices and certain other books or records belonging to the Acme Meat Company which were necessary and useable in filling out applications for subsidies?

A. Some of them; yes.

Q. To make that clearer, isn't it a fact that the subsidies were made up from invoices, or what were they made up from? A. From invoices.

Q. From the invoices? A. Yes.

Q. How often were those applications for subsidies made? A. Once a month.

Q. Every month for the preceding month, weren't they? A. Yes.

Q. And they had to be made accurately from the invoice, didn't they? [237]

A. Yes.

Q. Isn't it a fact that Mr. Ormont either telephoned you or saw you and talked to you several times and asked you to return those invoices that you had in your possession in order that he might make up his application for subsidies?

A. I made those up myself.

Q. Did you make every one of them up?

A. As long as I worked for him; yes.

(Testimony of Ernest Link.)

Q. Isn't it a fact—I will ask you again—that he communicated with you and asked you on numerous occasions in 1945, until April at least, to please return his books and records and his invoices so that he might file his applications for subsidies? Answer that yes or no.

Mr. Strong: I don't know what this provides. I think it is irrelevant and immaterial.

The Court: The objection is overruled.

The Witness: No.

The Court: It goes to the bias and prejudice of the witness.

Q. (By Mr. Robnett): You say he never did?

A. No.

Q. I will ask you if, as a matter of fact, you weren't disgruntled at Mr. Ormont because he had hired this other bookkeeper, full-time bookkeeper, and you so told Mr. Ormont [238] that you were?

A. Yes.

Q. That was early after he had hired him and before you quit working?

A. That was at the time when I quit.

Q. That was at the time you then told him?

A. Yes.

Q. That you were disgruntled because he had hired another bookkeeper? A. Yes.

Q. Now at that particular time you had some of his books and records in your possession, didn't you? A. Yes.

(Testimony of Ernest Link.)

Q. And you had a lot of his invoices in your possession?

A. The invoices, sales invoices, were in the possession of the Defense Supplies Corporation.

The Court: Did you have any in your possession, any kind of invoices?

The Witness: As to sales invoices——

The Court: No, any kind of invoices.

The Witness: Yes.

Q. (By Mr. Robnett): And you had them in your possession for several days at a time, didn't you? [239]

A. Yes.

Q. And you kept them there? A. Yes.

Q. And then you told him you were quitting?

A. Yes.

Q. And you didn't return them to him until he had demanded them several times, didn't you?

A. Yes.

Q. That is correct, isn't it?

A. That is correct.

Q. And you knew that they were necessary for him to have in order for him to obtain subsidies, didn't you? A. No.

Q. You did not? A. No.

Q. Did you not know that it was necessary to use the invoices in order to make an application for subsidies?

A. Those applications, I had already made myself.

Q. Did you make them and send them in?

A. Pardon me?

(Testimony of Ernest Link.)

Q. Did you make them and send them in to the proper officials so that subsidies might be granted and paid?

A. For the month of—up to and including March, yes.

Q. But it was in April that you still had a lot of his invoices, wasn't it, and that he would need for the month [240] of April to make his application?

A. For subsidies, no.

Q. You didn't have any then? A. No.

Q. You had some in your possession, didn't you?

A. Not concerning subsidies.

Q. What kind of invoices did you have?

A. Sales invoices.

Q. Sales only?

A. Mostly, only the ledger.

Q. The ledger is an entirely separate document from the invoices, isn't it?

The Court: Counsel, I see it is 12:00 o'clock.

We will recess until 2:00 o'clock.

Remember the admonition.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m., of the same date.)

Los Angeles, California, Tuesday, May 27, 1947

2 P.M.

The Court: The usual stipulation?

Mr. Strong: Yes, sir.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

ERNEST LINK

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Robnett:

Q. Mr. Link, I am going to show you Government's Exhibit 3, which is the Sam Ormont income tax return for 1944; that is, a photostatic copy of it. I wish you would look at page 3 thereof, and I also show you Defendants' Exhibit H, which was a profit and loss statement which was made out by you, as you testified this morning, including the entire year of 1944.

The Court: Has H been offered in evidence?

Mr. Robnett: I think it is in evidence.

The Clerk: It is in evidence.

Q. (By Mr. Robnett): And I call your attention particularly to the figures in pen and ink, where it says: Total profit, 1944, \$11,649.57, [245] and ask you if that same figure, identical figure, appears on said third page of the exhibit that you hold in your hand? A. Yes, it does.

(Testimony of Ernest Link.)

The Court: Let me have the question.

(Question read by the reporter.)

The Court: Which is Exhibit 3, and it appears in pen and ink on Exhibit H.

Mr. Robnett: Correct.

Q. And where it appears on the third page of Exhibit 3, it appears on line 22, doesn't it, which says: Net profit? A. Yes.

Q. Mr. Link, in the month of April, 1945, you went down to the stockyards and saw Mr. Ormont, did you not? A. Yes.

Q. Do you remember the date?

A. No, not exactly.

Q. Do you know about when it was in April?

A. It was after I left his services.

Q. After you left his service, and you had a conversation with him at that time?

A. Yes.

Q. Just the two of you present?

A. That's right.

Q. I will ask you if you did not ask him at that time, or tell him, rather, at that time, that you wanted to buy a [246] home in La Canada? Did you? A. No.

Q. Were you contemplating purchasing a home anywhere?

A. I have been looking for a home for the last four years; at that time, for four years.

Q. Did you finish your answer? A. Yes.

Q. Did you tell him at that time that you wanted to buy a home? A. No.

(Testimony of Ernest Link.)

Q. You didn't mention it? A. No.

Q. Did you tell him at that time, or ask him, to loan you \$10,000. A. No, sir.

Q. Did you ask him at that time to give you \$10,000? A. No, sir.

Q. Did you at any time ask him to loan you \$10,000? A. No, sir.

Q. Did you ask him at any time to give you \$10,000? A. No, sir.

Q. Isn't it a fact, that it was after that, that is, during the conversation, that you said to him that you wanted to buy a home, and that you needed \$10,000, and you wanted him to let you have it, and he asked you if you had any collateral [247] or security for it, and you said no, and he said that was a lot of money, and wanted to know if you would give him a note if he let you have it, and you said no? Did any such conversation take place?

A. No, sir.

Q. Didn't you then say to him. I have a notion to turn you in, or report you, or something of that sort? A. No, sir.

Q. It was not at that conversation that you made that statement? A. That is correct.

Mr. Strong: I object to that. There is no showing that the statement was made. He said that you made that statement then.

The Court: Objection overruled.

Q. (By Mr. Robnett): You testified yesterday, I believe, that you at one time did make such a statement? A. Yes.

(Testimony of Ernest Link.)

Q. When was that made?

A. When I called him on the telephone a day or two after I left his services. At that time, when I left his services he asked me to reconsider my leaving, and I did not answer directly, so I wanted to make it clear to him that I did not intend to return to his services, and I called him a day [248] or two later, and told him so.

Q. You told him that you intended to report him to some officials?

A. That I had in mind doing so, yes.

Q. You subsequently did report him to some official, did you?

A. He was already under investigation.

Mr. Robnett: I move to strike the answer.

The Court: It may be stricken.

Q. (By Mr. Robnett): I ask you to answer the question yes or no: Did you subsequently report him to any Government official? A. Yes.

Q. To whom?

A. To the Defense Supply Corporation. [249]

Q. Do you remember what particular individual you talked to?

A. I don't remember the name of the gentleman—I remember the face of the gentleman but not the name of him.

The Court: You what?

The Witness: I don't remember the name of the gentleman. I remember the face.

Q. (By Mr. Robnett): Have you seen him in this courtroom at any time? A. No.

(Testimony of Ernest Link.)

Q. Did you at any time report Mr. Ormont to any other Governmental department or agents?

A. Yes.

Q. When did you do so?

A. It was about the same time; one of those days close to the day that I reported him in the Defense Supplies Corporation. I don't know the exact date.

Q. To whom did you report him the second time?

A. To Mr. Birchard of the Federal Government, of the Internal Revenue Department.

Q. To whom did you talk there?

A. To Mr. Birchard.

Q. He is here in the courtroom, is he?

A. Yes.

Q. He is the gentleman sitting at Mr. Strong's right? [250]

A. Yes.

Q. Where did you report that to him?

A. To his office.

Q. You went to his office?

A. That is correct.

Q. Did you at that time take with you some of the records or books of the Acme Meat Company?

A. I don't remember that exactly.

Q. You did at one time show Mr. Birchard some of the books and records of the Acme Meat Company, didn't you?

A. Yes.

Q. And you had them in your possession at the time you showed them to him?

A. Yes.

Q. And that was after you had ceased employment with Mr. Ormont.

A. Yes.

(Testimony of Ernest Link.)

Q. You turned over to Mr. Birchard some of those records and books, did you not?

A. I gave them to Mr. Birchard; yes.

Q. You knew at the time that they were the property of the Acme Meat Company, or Sam Ormont, the owner of the Acme Meat Company, didn't you? A. Yes.

Q. And you knew that the only way you had come into [251] possession of them was because you had got them while you were an employee of his? A. Yes.

Mr. Robnett: I thank you very much, and that is all.

The Court: Redirect?

Mr. Strong: There is another defendant, your Honor.

The Court: Any cross-examination of this witness?

Mr. Katz: No cross-examination, your Honor.

The Court: Redirect?

Mr. Strong: Yes, your Honor.

I want to indicate at this time before I start that I intend to ask the Court's permission to apply this witness' entire testimony against the defendant Himmelfarb. I am doing that so that if there is any cross-examination it can be had at this time.

Redirect Examination

By Mr. Strong:

Q. Now, Mr. Link, going into the transactions concerning which you have testified here, as to

(Testimony of Ernest Link.)

which entries were made on the books and as to which these checks were shown to you, that is Defendants' Exhibits B, C, D and E, and this document, Defendants' Exhibit H, and some other documents——

The Court: G.

Q. (By Mr. Strong): ——G, H—will you relate exactly what transpired [252] on the occasion that you testified to, giving the full conversation and not just parts of it, between you and Mr. Ormont as to those changes of the entries, those entries which total some three-thousand-odd dollars?

Mr. Robnett: Object to that as having been asked and answered. He was asked about that by counsel yesterday to give the conversations.

The Court: And it is not redirect. It was covered in your original direct examination. The objection is sustained.

Mr. Strong: Your Honor, they asked some questions which didn't bring out the full transactions. I would like to rehabilitate and bring in the full conversation.

The Court: You asked for the full conversation. The witness gave it. Upon cross-examination, counsel, within his rights, asked him if he didn't say such-and-such, and the witness said yes. You are foreclosed on redirect. You asked him that question. Objection sustained.

Q. (By Mr. Strong): Now in connection with these payments, these changes, did you bring the subsidy feature to Mr. Ormont's attention or did he bring it to yours in the first instance?

(Testimony of Ernest Link.)

Mr. Robnett: I object to that as not redirect.

The Court: Did you what?

(The question referred to was read by the reporter as set forth above.) [253]

Mr. Robnett: I add to my objection also that it is too general and doesn't specify just what features of subsidy he is referring to.

The Court: Objection sustained.

Q. (By Mr. Strong): Mr. Link, you testified that Mr. Ormont made some changes in connection with the three sums or four sums which total some three thousand-odd dollars. Now did you speak to Mr. Ormont first about those sums or did he speak to you in the first instance?

A. I spoke to him first.

Mr. Robnett: I object on the ground it is not redirect.

The Court: Objection sustained.

Q. (By Mr. Strong): As to these checks which are in evidence as Defendants' Exhibits B, C and D, will you state what Mr. Ormont said to you about drawing those checks?

Mr. Robnett: Object to that on the ground it has been asked and answered several times.

Mr. Strong: It was first brought up on cross-examination.

Mr. Robnett: That is right, but it was asked and answered several times.

The Court: Objection overruled. It is new matter brought in on cross-examination. [254]

(Testimony of Ernest Link.)

Q. (By Mr. Strong): Give us the conversation with reference to those checks.

A. Mr. Ormont told me that he would issue personal checks in order to make up the difference between the actual amount of the purchases and those amounts which he had asked me to change in order to avoid the loss of some of the subsidy payments.

Q. When did he tell you that?

A. In December.

Q. When with reference to the date upon which the changes were made in the books as you testified?

A. I did not quite understand.

Q. I said when did he tell you this, with reference to the dates on which the changes were made in the books?

A. With reference to the changes for the month of September, October and November.

Q. When did he tell you this, in September, October or November? A. In December.

Q. And did he tell you why he was drawing those checks in December?

Mr. Robnett: Object to that as leading and suggestive, asking for a conversation.

The Court: Objection sustained. [255]

Mr. Strong: I don't understand the objection. I am asking for a conversation.

The Court: Read the question and the objection.

(Record read by the reporter.)

The Court: Objection sustained.

(Testimony of Ernest Link.)

Q. (By Mr. Strong): What did he tell you about getting these checks at that time?

Mr. Robnett: That is objected to upon the ground that he has already answered on direct examination

The Witness: I have not finished my answer.

The Court: The witness says he has not finished his answer.

Mr. Strong: Finish it.

A. He told me that those were checks in payment of differences and changes which he had asked me to make, and which he made on the original bills in order to avoid the loss of the subsidy payments. That those were payments which he wanted to appear on the books as being made to offset the loss of subsidy payments.

Mr. Robnett: I move to strike the answer out upon the ground that it does not prove or disprove anything in this indictment.

Mr. Strong: It proves that the records are false.

The Court: Government counsel's statement to the jury [256] will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel.

Mr. Strong: I am sorry.

The Court: And your objection?

Mr. Robnett: My objection is that it does not prove or disprove any issue, and goes to a matter, he says, on the subsidy.

(Testimony of Ernest Link.)

The Court: The objection is overruled. The motion to strike denied.

Q. (By Mr. Strong): As I understand it, you testified to three different changes that were made, one September, one October, and one November, is that right?

A. Yes, he told me over the telephone at one time how much to raise the amount.

Mr. Robnett: Just a minute. That is not responsive to any question, and I move to strike the answer as to what he told him.

The Court: Let me hear the question.

(Question read by the reporter.)

The Court: After the word "yes" it may be stricken.

Q. (By Mr. Strong): And did you see Mr. Ormont when he made the changes, [257] making the exact changes on the invoices?

Mr. Robnett: I object to that upon the ground that there is no such evidence, as I recall in the record, that Mr. Ormont made any changes on the invoices.

The Court: Objection sustained.

Q. (By Mr. Strong): Where did Mr. Ormont make the change?

Mr. Robnett: That has been asked and answered.

The Court: Objection sustained.

Mr. Strong: May I ask the reporter to read to me so that I may know how to ask the question?

The Court: There is a transcript of the testimony here. You have been furnished with a copy.

(Testimony of Ernest Link.)

Mr. Strong: May I look through it at this time?

The Court: Not at this time. You will have ample opportunity.

Mr. Strong: It was just furnished me.

The Court: We will proceed with the examination.

Mr. Strong: I have no further questions, your Honor.

The Court: Very well. Is there any further cross?

Mr. Robnett: No, your Honor.

The Court: Any other cross, Mr. Katz.

Mr. Katz. No.

Mr. Strong: May I reserve the right to call the witness later? [258]

The Court: On redirect examination?

Mr. Strong: I have not had a chance to read the transcript. It just came to me.

The Court: You have been present in the court room all the time. The witness will step down. He may remain in attendance if you desire. Do you desire him to remain in attendance?

Mr. Strong: If you please, your Honor.

The Court: You may remain in attendance until excused by the Government counsel or myself.

(Witness temporarily excused.)

Mr. Strong: Mr. Eustice.

J. BRYANT EUSTICE

a witness called by and on behalf of the plaintiff,
having been first duly sworn, was examined and
testified as follows:

The Clerk: May I have your name?

The Witness: J. Bryant Eustice.

The Clerk: Your address, Mr. Eustice?

The Court: You are upstairs in the Internal
Revenue Bureau?

The Witness: Yes, your Honor.

Direct Examination

By Mr. Strong:

Q. Mr. Eustice, are you acquainted with the
defendants Sam Ormont and Phillip Himmelfarb?

A. Yes, I am.

Q. When did you first become acquainted with
them?

A. About November 8th, 1945.

Q. Was that in connection with the performance
of your official duties as an agent for the Bureau of
Internal Revenue? A. Yes, sir.

Q. And were you assigned to conduct an investi-
gation with reference to either of the defendants?

A. Yes, both Mr. Ormont and Mr. Himmelfarb.

Q. What were you investigating?

A. The 1942, 1943 and 1944 income tax returns
of both defendants.

Mr. Katz: I object to this, if the Court please,
and move to strike the answer, as 1942 and 1943 is
not in issue against the defendant Himmelfarb.

(Testimony of J. Bryant Eustice.)

The Court: They are not in issue, but I think the answer is proper. They investigate almost everybody's returns.

Q. (By Mr. Strong): Would you state briefly the steps that you went through making the investigation as to the income tax return for the defendant Sam Ormont, for the year 1942?

Mr. Robnett: I object to that as too general, incompetent, irrelevant and immaterial—the steps he went through generally.

Mr. Strong: I want to show how he investigated. I am not [260] going into particulars or details.

The Court: I don't see how that is the slightest bit material. Objection sustained.

Mr. Strong: Is that only as to year, or for any year I will ask?

The Court: How this witness investigated somebody is immaterial.

Q. (By Mr. Strong): Will you state what steps you took in investigating the income of the defendant Sam Ormont, for the years 1942, 1943 and 1944?

Mr. Robnett: Same objection.

The Court: Same ruling. What steps he took is immaterial.

Q. (By Mr. Strong): Will you state what sources of information you used in investigating the income tax and the income of the defendant Sam Ormont for the years 1942, 1943 and 1944?

Mr. Robnett: I object to that on the ground that it is asking for the opinion of the witness, and

(Testimony of J. Bryant Eustice.)

the conclusion of the witness, and is too general—what sources of information he used. It is seeking hearsay evidence. It could be. We don't know what it would be.

The Court: Sustained.

Mr. Strong: On which of those grounds?

The Court: All of them, and several others which he might have added. [261]

Q. (By Mr. Strong): I have placed before you various documents and records which are in evidence in this case. Will you please examine those documents and state whether you examined them in connection with your investigation into the income tax of either of the defendants for the year 1942, '43 or '44?

A. The first document is a——

The Court: Or the originals of which they are photostats.

The Witness: This is a photostatic copy of the original 1942 income tax return.

Q. (By Mr. Strong): Will you give the numbers of the documents as you answer?

A. No. 1, 1942 income tax return of Sam Ormont.

The Court: Have you examined that? Did you examine the original of which that is a photostat, or a photostat?

The Witness: I had the original in my possession.

The Court: The original return?

(Testimony of J. Bryant Eustice.)

The Witness: The original return in my possession, your Honor, when I started the investigation to examine the books and records of the Acme Meat Company and other sources of information.

No. 2 is the 1943, or a photostatic copy of the 1943, income tax return of Sam Ormont. I also had the original in [262] my possession at the time I made the examination.

No. 3 is a photostatic copy of the 1944 income tax return of Sam Ormont. I also had the original income tax return in my possession at the time I made the examination.

No. 4 is the 1944, or a photostatic copy of the 1944, income tax return of Phillip Himmelfarb. I also had the original of this return.

No. 5 is the photostatic copy of the 1944 income tax return of Ruth Himmelfarb. I had the original of this return.

Exhibit A is a photostatic copy of savings Account No. 747 of Sam Ormont—it doesn't say where it is; I know what bank it is, it is the Bank of America at Brooklyn and Soto Streets.

The Court: Did you examine the original of that?

The Witness: I examined the original and made a copy, a transcript, of the account and analysis of the bank deposits.

No. 37 are original bank deposits slips of Sam Ormont to this savings account, No. 747, which I identified as Exhibit A.

The Court: Did you examine those?

(Testimony of J. Bryant Eustice.)

The Witness: I examined these deposit slips, your Honor, and traced the source of certain items that are on the deposit slips. [263]

The Court: That is the source as indicated on the deposit slip?

The Witness: Well, the deposit slips indicate where the checks that were deposited, what bank they were drawn on, and I could determine, or did determine, from that information where the checks came from.

Exhibit No. 11 was the original ledger card on savings account of Sam Ormont, savings account No. 747 at the Bank of America, Brooklyn and Soto Streets.

No. 12 is a continuation of this original ledger card.

No. 15 is the original ledger card of Sam Ormont's commercial bank account at the Security-First National Bank, Huntington Park.

No. 16 is Sam Ormont's, or the original ledger card on Sam Ormont's savings account, No. 224808 at the Security-First National Bank, Huntington Park.

The Court: Did you examine them?

The Witness: Yes, your Honor.

The Court: You know what those exhibits are. The question is whether or not you have seen them before.

The Witness: Yes, your Honor, I have seen all of these that I have identified and made transcripts of all of them.

(Testimony of J. Bryant Eustice.)

No. 14 are the original deposit slips of Sam Ormont to his commercial account at the Security-First National Bank, Huntington Park. I examined these deposit slips and made [264] copies of them.

No. 23 are the original deposit slips of the Acme Meat Company to the Citizens National Bank. I examined these original deposit slips and made copies.

No. 22 is a signature card of the Acme Meat Company, payroll account, for Citizens National Bank.

No. 21 is a signature card of the Acme Meat Company, also at the Citizens National Bank.

No. 19 is a counter receipt signed by Sam Ormont for the withdrawal of \$5992.51 from the Security National Bank, Huntington Park branch.

The Court: You examined it?

The Witness: No. 20?

The Court: The previous one that you identified?

The Witness: Yes.

The Court: You have examined each one of these that you are identifying? You have examined the originals?

The Witness: I have examined them, your Honor.

No. 20 is a deposit slip to Sam Ormont's savings account, No. 224808, of the Security-First National Bank, Huntington Park, which I have previously examined.

Mr. Robnett: Will you speak a little louder, please?

The Witness: All right.

(Testimony of J. Bryant Eustice.)

No. 18 is a withdrawal slip or counter receipt drawn by Sam Ormont on the Security-First National Bank of Los Angeles [265] on its savings account No. 224808 for the amount of \$3750.

Does your Honor wish me to state each time that I have seen these?

The Court: Yes.

The Witness: Which I have previously examined.

The Court: If you haven't examined any of them, do not take the time to describe them because they have already been described and identified in the record.

The Witness: All right, sir.

No. 17 is a signature card of Sam Ormont for the term savings account No. 224808 of the Security-First National Bank, Huntington Park, which I have examined before.

No. 7 is the withdrawal slip by Sam Ormont from the savings account No. 747 of the Bank of America, Brooklyn and Soto, for \$12,500, which I have seen before. [266]

No. 8 is a withdrawal slip for \$2,500, signed by Sam Ormont, savings account No. 747, Bank of America, Brooklyn and Soto, which I have examined before.

No. 9 is a withdrawal slip, Bank of America, savings account No. 747, signed by Sam Ormont, for \$300. I don't recall definitely that I have seen that one, being a small amount.

(Testimony of J. Bryant Eustice.)

No. 10, signature card of Sam Ormont, for savings account No. 747, Bank of America, Brooklyn and Soto. I have seen this card before.

No. 13, signature card of Sam Ormont, for his commercial account, Security First National Bank, Huntington Park.

No. 24, original ledger cards of the Acme Meat Company at the Citizens National Bank. I haven't made an examination of all these ledger cards.

The Court: Of No. 24?

The Witness: Of No. 24, yes, your Honor.

The Court: All right.

The Witness: No. 25, signature card, Sam S. Ormont, at Merrill Lynch, Pierce——

The Court: Merrill Lynch, Pierce, Fenner & Beane?

The Witness: Fenner and Beane. Merrill Lynch, Fenner & Beane, that is not the name that is on the card. It is Merrill Lynch, E. A. Pierce and Cassett. They are operating at the present time as Merrill Lynch, Fenner & Beane. [267]

Mr. Robnett: We can't hear the statement of the witness.

The Court: He said that they are operating at the present time as Merrill Lynch, Pierce, Fenner & Beane.

The Witness: No. 26, a copy, original office copy of the ledger account of Sam S. Ormont. It is headed: Merrill Lynch, E. A. Pierce and Cassett.

No. 27 are copies, original office copies, of Sam

(Testimony of J. Bryant Eustice.)

S. Ormont account with Merrill Lynch, E. A. Pierce and Cassett. I will state that I have seen these copies before.

No. 28 are original office copies, Sam Ormont's account with Merrill Lynch, Pierce, Fenner & Beane.

No. 29, also original office copies, Sam S. Ormont's account with Merrill Lynch, Pierce, Fenner & Beane.

No. 30, also original office copy of Sam Ormont's account with Merrill Lynch, Pierce, Fenner & Beane.

No. 31, original office copies, Sam Ormont's account with Merrill Lynch, Pierce, Fenner & Beane.

No. 32, signature card of Phillip Himmelfarb, commercial account, at Bank of America. This is not one of the items that I identify—I mean, that I examined.

Mr. Strong: May we have that number in the record?

The Witness: No. 32, Phillip Himmelfarb.

Mr. Katz: May I have the record on that; that was or was not examined?

The Court: He said he did not examine it.

A. No. 32 was not examined by me.

No. 33 is a photostatic copy of a deposit slip in the name of Phillip Himmelfarb, Bank of America, which was not examined by me. [269]

No. 34, application for money order or cashier's check made payable to the Acme Meat Company, signed by Ruth Himmelfarb, for \$3150. This exhibit was not examined by me.

(Testimony of J. Bryant Eustice.)

Mr. Strong: What is the number?

The Court: No. 34.

The Witness: No. 35, a cashier's check drawn by the Bank of America, payable to the order of Acme Meat Company for \$3150. It looks like it was dated January 20, 1945. I don't recall having seen that.

No. 36 appears to be a certified copy of the original ledger card of Phillip Himmelfarb, Bank of America, First and Chicago Branch. I don't know without referring to my work papers whether I made a transcript of this account or not.

Mr. Strong: May he refer to his work papers?

The Court: Have you your work papers there?

The Witness: Yes, sir.

The Court: Is it necessary for you to refer to your work papers in order to refresh your recollection?

The Witness: On some of these.

The Court: If you refer to them counsel may have the opportunity of examining your work papers.

Mr. Strong: We have no objection.

Mr. Katz: Do you have those work papers with you?

The Witness: Yes, sir.

Mr. Katz: Which are the work papers which you intend to [270] refer to?

The Witness: (Indicating).

The Court: I think the witness might proceed with something else. Recess will be coming up

(Testimony of J. Bryant Eustice.)

pretty quick and I imagine it will take a little while to examine the work papers.

Mr. Katz: There are quite a few of them, your Honor.

The Court: Have you gone through the exhibits now, Mr. Eustice?

The Witness: There are two more, your Honor.

Exhibit 38 are office copies of sales invoices of the Acme Meat Company.

The Court: Office copies? Does it say office copies on there?

The Witness: Office copies.

The Court: That is what it says on them?

The Witness: It says office copies here. It is the original document.

The Court: All right.

The Witness: I have seen these invoices and examined them.

Exhibit 39 is a single invoice, No. 08346, of the Acme Meat Company, for sale of meat for \$270.60, which I have seen and examined before.

That is all the exhibits. [271]

The Court: Proceed, Mr. Strong.

Q. (By Mr. Strong): In addition to the exhibits that you have examined, did you in connection with your investigation into the income tax return of the defendant Sam Ormont for the years 1942, 1943 and 1944, and the defendant Phillip Himmelarb for the year 1944, examine any other books or records?

A. I examined the books and records of the Acme Meat Company.

(Testimony of J. Bryant Eustice.)

Mr. Katz: I object to that, if the Court please, and move to strike it, in so far as the defendant Himmelfarb is concerned, as there is no foundation laid for the testimony with respect to the examination of the books of the Acme Meat Company.

The Court: Motion denied. The question was limited to the year 1944, and he just said he examined the books with relation to the defendant Himmelfarb.

Q. (By Mr. Katz): You don't have those books now?

A. No, sir.

The Court: Where were they when you examined them?

The Witness: In the office of the Acme Meat Company.

The Court: You examined all the books and records they had there?

The Witness: For the years 1942, '43 and '44, and an [272] examination of any subsequent years that I considered necessary to the examination as far back as 1931.

The Court: Did you examine their records and check books, deposit slips?

The Witness: No, your Honor. I didn't consider that necessary in the examination, to examine the cancelled checks. I examined the cancelled checks for the year 1942, 1943 and 1944. I examined the personal withdrawals of Sam Ormont from 1931 to 1944 inclusive, that is, all withdrawals as recorded on the books and records of the capital

(Testimony of J. Bryant Eustice.)

account and to personal account of Sam Ormont, and also loans payable account as far back as there was any record on the books and records of the Acme Meat Company.

Q. (By Mr. Strong): What about as to Phillip Himmelfarb?

A. I examined the accounts showing his share of the profits for the year 1944, the amount of money that was paid to him.

Mr. Katz: I am going to interpose an objection, if the Court please, as a conclusion of the witness, and the records are hearsay as to this defendant.

The Court: Yes, that is a conclusion, as to his share of the profits, and the jury is instructed to disregard it.

Q. (By Mr. Strong): Did you make a transcript of the books and records [273] which you examined of the Acme Meat Company as you have testified? A. Of certain accounts.

Q. Do you have that here?

A. Yes, sir, I have.

Q. Is that part of your work papers?

A. Yes.

Q. Is that what you gave counsel to examine?

A. No, sir. That was regarding Phillip Himmelfarb only.

Q. Where are your work papers?

A. These are the work papers in connection with the examination of the books and records of the Acme Meat Company and other information.

(Testimony of J. Bryant Eustice.)

The Court: Will it be necessary for you to refer to those work papers in connection with your testimony here?

The Witness: Yes, your Honor.

The Court: All right.

Mr. Strong: May I show these to counsel?

The Court: Yes. I think this might be an appropriate time to recess because I presume the rest of your examination will be developed with that material.

Mr. Strong: Yes, your Honor.

The Court: We will have the afternoon recess. Remember the admonition.

(Short recess.) [274]

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Kosdon: Yes.

Mr. Strong: May I have this marked for identification, your Honor.

The Clerk: 40 and 41.

(The documents referred to were marked as Government's Exhibits 40 and 41 for identification.)

Q. (By Mr. Strong): Will you state what Government's Exhibit for identification is?

A. 40 are work papers made up during my examination of the income tax returns of Sam Ormont, and the examination of the books and records of the Acme Meat Company.

(Testimony of J. Bryant Eustice.)

Q. What about these other documents which you have testified about? A. 1941?

Q. No, the bank records and other documents.

The Court: They are not part of his work papers.

Q. (By Mr. Strong): Do your work papers reflect figures and data shown in these documents?

A. Yes, sir, they do.

The Court: What is 41? [275]

The Witness: 41, work papers I made in connection with the examination of Mr. Phillip Himmel-farb income tax return for the year 1944.

Q. (By Mr. Strong): Going back to 40, what years did that cover, of Sam Ormont?

A. There is information in the work papers and schedules.

Q. What I want to know is in connection with what income tax returns?

A. With the examination of his 1942, 1943 and 1944 income tax returns.

Q. In connection with those papers, did you prepare a summary of the work papers?

A. Yes, sir.

Q. Do you have that with you?

A. Do you mean of the adjustments I made as a result?

Q. Yes.

Mr. Strong: Your Honor, I have given a copy of this summary of adjustments to counsel for the defendants. May I hand one to the Court?

Mr. Katz: I did not get a copy of that.

(Testimony of J. Bryant Eustice.)

Mr. Strong: I will try to get an extra one. I hand you a complete set.

Mr. Katz: Thank you, Mr. Strong. [276]

Q. (By Mr. Strong): Taking them year by year, the defendant Sam Ormont, for the year 1942, will you give his income tax return for that year? I think it is before you. A. Yes.

Q. Did you make an examination of the books and records of the Acme Meat Company and various bank records which are before you in connection with the income tax return of defendant Sam Ormont for the year 1942? A. Yes, I did.

Q. And did you make any further investigation to determine the income of the defendant Sam Ormont for the year 1942?

A. Other than the books and records of the Acme Meat Company?

Q. Other than the income tax returns and from the books and records.

The Court: I don't think I understand your question. I don't know that the witness does.

Mr. Strong: My first question was whether or not you made an examination of the books and records and the various bank documents that are before you, to determine—rather, in connection with the income tax return itself, as it appears now?

A. Yes, I did. [277]

Q. Did you make any investigation to determine whether there was any additional income beyond that reported? A. Yes, that is correct.

(Testimony of J. Bryant Eustice.)

Q. The income for the year 1942—may I refer to the summary, your Honor, instead of the work papers, if there is no objection of counsel?

The Court: If it will aid the witness, if it is not otherwise objectionable, go ahead and ask him and we will see. That is the only way we can find out.

Q. (By Mr. Strong): Will you take the first, the income tax return for 1942, which is salary, and say what your examination of the books and records and other bank documents, and other documents before you disclosed as to the salary of the defendant Sam Ormont for the year 1942?

The Court: Let me hear the question.

(Question read by the reporter.)

Mr. Robnett: I object to the questions as calling for the conclusion of the witness. It would be immaterial. It is asking for his conclusion from things. We don't know what he examined.

The Court: Yes, that is right. Objection sustained. [278]

Q. (By Mr. Strong): Will you state what items you examined as reflected by your work papers in determining—

The Court: First of all, the salary reported is \$5200?

The Witness: Yes, your Honor.

The Court: Now in your examination, do you assert that there was an incorrect return of the amount of salary that he received?

(Testimony of J. Bryant Eustice.)

The Witness: Can I make a full explanation?

The Court: No. You can answer yes or no and we will get around to that. Do you assert that he received more salary than he reported?

The Witness: No, your Honor.

The Court: You do not?

The Witness: No.

Q. (By Mr. Strong): As to the second item, which is dividends, were there any dividends which were received by the defendant Sam Ormont for the year 1942? A. Yes.

Q. Were there any dividends reported by the defendant Sam Ormont for the year 1942?

A. No, there were not.

Q. Will you state what your investigation disclosed as to the dividends which were received by the defendant Sam Ormont [279] for the year 1942?

A. Well, the amount of dividends received were \$37.50.

Q. And that was not reported on the income tax return for the year 1942?

A. It is not reported on the income tax return.

The Court: Where did he get them from?

The Witness: They were credited to the taxpayer's account at Merrill Lynch, Pierce, Fenner & Beane.

The Court: They were credited to his account there?

The Witness: Yes, your Honor.

Q. (By Mr. Strong): The third item on the income tax return, interest, will you state whether

(Testimony of J. Bryant Eustice.)

you found any additional interest not reported on the return of Sam Ormont for the year 1942?

A. Yes, I did.

Q. How much was that?

The Court: I think that this witness can state what he asserts but the jury has to determine whether he found any.

Mr. Strong: I intend merely to have him state what he asserts is the amount. Of course it will be left to the jury whether it is accurate or not.

The Witness: Additional income of \$135.18.

The Court: How much did he report?

The Witness: \$1299.75 [280]

Q. (By Mr. Strong): And you assert that the correct amount is how much? A. \$1434.93.

Q. Now as to additional income not reported elsewhere appearing on item 9 on the income tax return, do you assert that there was any additional income over that reported?

A. Yes, there was.

Q. How much was that? A. \$3359.22.

Q. With reference to item 10, partnership——

The Court: How do you make that up? You didn't make it up out of thin air, did you?

The Witness: No, from the analysis of the taxpayer's bank accounts.

Mr. Robnett: I move to strike the answer out, if the Court please, on the ground that that is not proof of any income and that it is a conclusion of the witness.

(Testimony of J. Bryant Eustice.)

The Court: Yes. It is strictly a conclusion and it is not proof of any income.

Q. (By Mr. Strong): Will you state what items you found and upon what records you found them which make up the \$3359.22 which you say was additional income not reported?

A. That is, if I understand the question——

Q. You can use your work papers. [281]

A. That is what bank accounts they are?

Q. Yes, item by item.

A. Unidentified or unexplained cash deposits, \$760 to the Security-First National Bank, that is, to Sam Ormont's commercial account at the Security-First National Bank, Huntington Park, and \$500 in cash to the Bank of America savings account No. 747.

And unexplained checks deposited to the Security-First National Bank, Sam Ormont's commercial account, for \$186, to savings account No. 747, Bank of America, of \$725.72. That makes up a total of \$3359.22.

The Court: What are those figures again, 760, 500, 186 and 745?

The Witness: And 725.72.

The Court: And 725.22? What are they, from 760?

The Witness: 760——

The Court: 500, 168 and 745.22?

The Witness: 725.72.

The Court: 725.72 or 745.22?

The Witness: 725.72.

(Testimony of J. Bryant Eustice.)

The Court: And not 745.22.

The Witness: That is correct.

The Court: That makes up 3359?

The Witness: I might explain, I am taking this from my work papers, that is, the original work papers. Later on I [282] made——

The Court: That is only \$2171.

The Witness: Later on I made up my report from those.

The Court: And it is not \$3359?

The Witness: Can I refer to this?

The Court: Surely, you can refer to that. He is asking you how you made up your items, where you got them from.

The Witness: No, I have a further breakdown of that item in my report here. Those two items plus undisclosed funds used to purchase United States defense bonds of \$1187.50.

The Court: When you say they are undisclosed or unexplained, you mean that you didn't find any explanation of them in his books, of the Acme Meat Company, is that what you mean?

The Witness: Not exactly that, your Honor. The first step before I determined that any of these items were undisclosed was to account for all his sources of cash, or other funds that the taxpayer had access to for the year 1942, and these items are items that I could not trace to these known sources and which the taxpayer could not explain.

The Court: What were the known sources?

(Testimony of J. Bryant Eustice.)

The Witness: The drawings from the taxpayer's business. I have a complete summary, your Honor, of the funds of the taxpayer which he had available to him in 1942.

The Court: From what sources, his business?

The Witness: Yes, withdrawal from the Acme Meat Company, from which he drew \$12,506.09. Of this amount he deposited \$12,000 to his personal bank accounts. He received interest checks from Sam and Ben Borne for \$1290.75. He deposited \$990 to his personal bank accounts. He had interest on savings accounts which were credited to his bank accounts of \$135.18. He received repayment of a loan that he had made in previous years to Sam and Ben Borne of \$10,000. He received payment of a loan that he had previously made to Nolan Allen of \$200.

In addition to these items which could be traced, he received cash deposits of \$1260, and the checks for \$911.72, not only accounted for the money that he received and he had access to, but what disposition he made of those funds and received them, which are as follows—— [284]

The Court: Did you check to see whether or not apparently he had a savings bank account, in one of the banks, and were the deposits check from another bank, or shifted back and forth from one bank to another?

A. Yes, I traced all transfers from one bank to another, and can account for all of them.

Q. (By Mr. Strong): About bonds—did you find anything about bonds?

(Testimony of J. Bryant Eustice.)

A. I was about to show the disposition of these funds. The taxpayer withdrew from his personal bank accounts and deposited in the Acme Meat Company \$3,800. He purchased defense bonds by withdrawal from his personal bank accounts of \$7750. He made payments on life insurance premiums of \$1058.15. He paid on his 1940-1941 federal income tax \$1015.17. He had other personal expenditures, which he paid by check, of \$887.40.

It can be shown that his total expenditures for personal use, when you account for all those items that were available to him, were \$506.09, of the checks drawn from Acme, which he did not deposit to his bank account; \$309.75, he received on interest payments from Sam and Ben Borne, which he did not deposit to his bank account, and \$887.40, which was checks for personal use, on his business bank account—the total amount for personal expenditures which we took into consideration was \$703.24. All other items that he received in the [285] disposition of these funds has been accounted for. In addition to that he received \$1260 cash, \$911.72 in checks——

The Court: What \$1260?

The Witness: That's \$760 and \$500 items.

The Court: You mean it shows a deposit there of cash?

A. Yes. That is in addition to the bonds that we show that he bought, of \$7750, that he purchased from withdrawals from his bank accounts.

Q. (By Mr. Strong): I did not hear the last item. How much was that?

(Testimony of J. Bryant Eustice.)

A. I said in addition to the defense bonds which the taxpayer purchased from withdrawals from his bank accounts, he purchased other defense bonds from undisclosed funds, in the amount of \$1187.50.

Q. Did you examine the bonds themselves?

A. Before I went on——

Q. Say yes or no.

A. No, I did not examine them myself.

Q. Go ahead; continue.

The Court: How do you know he bought them then?

The Witness: There are other special agents who were on the job before I was, and they made a list of the bonds, took an inventory of them, and I am stating what was given to me.

The Court: According to the information you received from them? [286]

The Witness: From other agents. I have a complete list of them.

Mr. Strong: They will testify, your Honor.

Mr. Robnett: I move to strike that out as hearsay.

The Court: It is hearsay. Go ahead, counsel.

Mr. Strong: He was detailing sources from which he obtained information.

The Court: I thought he had finished with that item.

The Witness: I was about to say the total of those items, \$760, \$500, \$186, \$225.72, and \$1187.50, make up the adjustment of income not reported of \$3359.22.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: If the Court please, I move to strike out all the testimony the witness has given in this connection upon the ground that it is partially based upon hearsay, but most of it is a mere assumption and conclusion of the witness. He has used, for instance, one item he testified to which showed that there was a \$10,000 repayment of a loan he previously made. That is not income. Your Honor, of course, knows that in many of the items he has testified to here, he said they were unexplained, so far as he was concerned, and it is purely a conclusion of the witness, and is not the kind of evidence to introduce before a jury to try to convict a man for evading income tax.

Mr. Strong: Income, on unexplained deposits, I think the law is clear that unexplained deposits are income, unless the [287] taxpayer has some explanation.

The Court: I don't know that that is the law. That certainly is the rule which is followed by the Internal Revenue Bureau.

Mr. Strong: I can cite several cases subsequently to your Honor.

The Court: In connection with their calculations.

Mr. Robnett: Other than that, there is no foundation.

The Court: I think all of that rather goes to the weight of the testimony of this witness. Wherever this witness uses the words "I find that his income was such and such, and the adjusted income should have been so much," it must be accepted only as the

(Testimony of J. Bryant Eustice.)

opinion and conclusion of this witness, because, after all, an income tax agent, so far as that phase of his testimony is concerned, is nothing more or less than an expert witness, and the jury may disregard his testimony, if they desire, in that respect. It goes to the weight of his testimony; not to its admissibility.

Mr. Robnett: No proper foundation has been laid for any of it by this witness. Further than that, there is no showing that as to all of these things where he was getting his information from, and he is testifying here today concerning opinions. They may have been opinions, as he admitted as to the bonds, obtained from someone else. It is hearsay. There is not anything authentic about them. I never heard him testify [288] he made all of that report.

The Court: I understood he made the examination of the bank deposits, and he made the examination of the Merril Lynch Company, or whatever the name is. The only assumption, if I understand his testimony correctly, that he made was the assumption that he had purchased this \$1100 in bonds; that he himself did not examine the bonds, and therefore could not testify they stood in the name of that party or this party purchased them.

Mr. Robnett: I don't believe they have laid any foundation that this report he has before him was made by him from things he did examine.

The Court: I understood that that was his testimony. Is that correct? He is asked now to testify

(Testimony of J. Bryant Eustice.)

here, and he is referring to his work papers, and testifying to what he found, and his work papers are for the purpose of refreshing his recollection.

Mr. Robnett: I appreciate that, your Honor, but they are very voluminous. I wonder if he made them all up.

The Court: Did you make up the work papers? Are these your work papers?

The Witness: These are all made up by me, with the exception that some of the writing is not my writing on the reports. That was made by Mr. Phoebus, who was with me during the course of the examination, in going to the banks, and [289] making transcripts. I asked Mr. Phoebus if he would copy some of the ledger cards.

The Court: You examined the original, however?

The Witness: Yes, your Honor.

The Court: He merely did the manual copying?

The Witness: That is correct.

The Court: You examined the original cards, and made the checking yourself?

The Witness: Yes, and an inspection of the deposit slips.

The Court: I think it goes to the weight of the testimony of the witness, and not to its admissibility.

Q. (By Mr. Strong): What you have been discussing now was item 9, income not reported, as shown on the return, is that right?

A. That is correct.

Q. Now item 10, partnership income?

(Testimony of J. Bryant Eustice.)

A. The income tax return showed \$5008.18. There was added to that the \$5200 salary item.

The Court: Which he did report?

The Witness: Which he reported. It was just an adjustment, changing the salary to income from the partnership; for income tax purposes, a partner does not draw a salary. There was no change in the income, additional income from the books and records of the Acme Meat Company. [290]

Q. (By Mr. Strong): Taking all of these items reported on the 1942 calendar year return of Sam Ormont, what was the total amount reported as the income for income tax purposes; that is, the net income? A. For the year 1942?

Q. Yes.

A. Net income reported by the taxpayer was \$10891.52. The corrected——

Mr. Robnett: I object to this as not responsive, if the Court please.

Q. (By Mr. Strong): What was the corrected amount of net income as you claim it?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial. It is only his opinion.

Mr. Strong: Based on the figures which he has given.

The Court: Yes. Objection overruled.

A. \$14,423.42. [291]

The Court: The additional items of income which you assert he received and did not report were the dividends of \$37.50, the interest of \$135, and these miscellaneous unexplained items of \$3300-odd?

(Testimony of J. Bryant Eustice.)

The Witness: That is correct.

The Court: So far as salary or partnership income return is concerned, the fact is that you shifted them around in the columns here and increased them, and so forth, and he reported all the money he got?

The Witness: Yes.

The Court: You just put them in other columns?

The Witness: Yes. There was no change in the partnership income.

Mr. Strong: Just the salary, as I understand it.

The Court: He just put in another column. He actually reported all the money that he got from the partnership?

The Witness: That is correct.

Mr. Strong: As salary.

The Court: No, he reported his partnership income in addition to that, \$5200 salary and \$5000 partnership income.

Q. (By Mr. Strong): What was the tax as reported by the defendant Sam Ormont for the year 1942? A. \$2477.91.

The Court: You disallowed some deductions there too, [292] didn't you?

The Witness: No deductions?

The Court: Did you disallow some?

The Witness: No, I did not disallow any deductions. The same deductions were allowed on the corrected return.

The Court: As were allowed on the original return?

(Testimony of J. Bryant Eustice.)

The Witness: As were allowed on the original return.

The Court: I see.

Q. (By Mr. Strong): On the basis of the corrected net income as you have testified here, have you computed what his tax should have been?

A. Yes.

Q. How much was that? A. \$3875.84.

Q. Will you state how much the additional unreported amount of income tax was?

A. \$1397.93.

The Court: The additional income was \$3531.90 upon which he would have owed approximately half of that as tax, is that right?

The Witness: That is correct.

Mr. Strong: I am sorry. I didn't get that.

The Court: Read it.

(The record referred to was read by the reporter as set forth above). [293]

The Witness: About one-third.

The Court: Well, \$3500 and \$1397 tax.

The Witness: I was looking at the wrong figure.

The Court: All right. Go ahead.

Q. (By Mr. Strong): Now taking the year 1943, the defendant Sam Ormont's income tax return for that year, item No. 1 was salary. That was reported as what? A. \$650.

Q. And do you claim that there was any additional salary received for that year?

A. No, sir.

(Testimony of J. Bryant Eustice.)

Q. Item No. 2, dividends, were they any dividends reported by the defendant Sam Ormont?

A. None reported.

Q. Do you claim that there were any dividends? A. \$33.75.

Q. Where did you get those items?

A. That was credited to the taxpayer's account at Merrill Lynch, Pierce, Fenner & Beane.

Q. The third item, interest, was there any interest reported by the taxpayer as received?

A. There was none reported on the return.

Q. Do you claim that there was interest which should [294] have been reported?

A. Yes, in the amount of \$249.38.

Q. What is that made up of?

A. Income on bank deposits. I will make sure.
(Examining documents.)

Q. Take the specific items and break it up.

A. There was 81.38 on savings banks deposits.

Q. What bank?

A. \$27.41 credited to the savings account No. 224808 of the Security First National Bank, and \$53.97 credited to the savings account No. 747 of the Bank of America.

Q. Is that all?

A. And \$105 interest on the taxpayer's personal loan to Sam and Ben Borne.

He also received \$63 from a loan made to Frank B. Smith. The loan had been made in 1941.

I believe that makes up the total of \$249.38.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Strong): Item 4(b) on the income tax return, interest from Government obligations, the sum reported is \$387.50, is that right?

A. That is correct.

Q. Do you claim any additional amounts were received? A. No changes.

Q. Item 6(a), which is capital gains, what sum is reported on the return? [295]

A. There was none reported.

Q. Do you claim there was any?

A. \$185.87.

Q. Where did you get that?

A. That is from an examination of these records, examination of Sam Ormont's accounts with Merrill Lynch, Pierce, Fenner & Beane which indicated sale of 300 shares of Standard Brands and 15 shares of Socony-Vacuum Oil which were sold in 1943. The profit on those from the sale was \$371.73, which was reported as a capital gain at 50 per cent, or \$185.87.

Q. Now skipping the next item on your summary and going to item 8 for a moment, net profit was reported on the income tax return from the defendant's business for the year. In what sum was that? A. \$11,525.22.

Q. And do you claim any additional amounts other than that?

A. No additional amount.

Q. Then item 9, which is partnership income, what amount was reported?

A. A loss of \$18.10.

(Testimony of J. Bryant Eustice.)

Q. Do you claim there was any money received in that connection?

A. Well, he received \$650 from that partnership, [296] which he reported as salary. It should have been reported as partnership income and by bringing it down to report as partnership income it shows income from the partnership of \$631.90 instead of a loss of \$18.10. There is no additional income on account of those two items.

The Court: But he actually showed the money received in his return?

The Witness: Yes, there is no additional income on account of these two items.

Q. (By Mr. Strong): That is the same as the item of salary? A. That is correct.

Q. Was there any other undisclosed income which you claim was received by the taxpayer and not reported on this return? A. Yes.

Q. How much?

A. In the amount of \$18,109.30.

Q. Where did you get that from? What items does that consist of?

A. Cash from undisclosed sources deposited to the personal bank accounts of the taxpayer.

Q. How much was that? A. \$1675.

Q. All right. [297]

A. He purchased United States Government bonds during 1943 of \$51,475.

The Court: How much?

The Witness: \$51,475.

(Testimony of J. Bryant Eustice.)

Of these bonds he purchased by checks drawn on his personal bank accounts \$32,390.24, and by checks drawn on his business bank account, that is, Acme Meat Company, \$5000.

It was the total of those two items, that is, from known sources, \$37,390.24. The difference between that and the actual bonds purchased was \$14,084.76, which could not be traced to any known sources and was not explained by the taxpayer where the source of the funds came from. [298]

Q. (By Mr. Strong): Now the total amount of net income reported on the income tax return for the year 1943 was how much?

The Court: What was that last amount of bonds, the difference between \$38,000 and \$52,000?

The Witness: The undisclosed income, \$14,084.76. There were a couple of more items.

Mr. Strong: I am sorry. I thought you were finished.

The Court: Those bonds, the same situation is true there, you don't know whether he bought them or didn't buy them? You are taking some other agent's assumption in that?

The Witness: That is correct.

Mr. Robnett: May I move to strike that out, if the Court please, that whole testimony as to \$14,000, on the ground it is hearsay?

Mr. Strong: We will connect it up with other agents.

The Court: It may be stricken if it is not connected up. You can reserve your motion to strike.

(Testimony of J. Bryant Eustice.)

The Witness: There were checks from undisclosed sources deposited to the personal bank accounts of \$612.54. There were receipts from undisclosed sources deposited to the business bank accounts and credited to Sam Ormont's capital account on the books of the Acme Meat Company of \$1,737.

The total of all these items of income, undisclosed by [299] the taxpayer, amounts to \$18,109.30, which is the amount we have here as item 7 on the adjustments.

Q. (By Mr. Strong): What was the total amount of net income reported by the taxpayer for the calendar year 1943 on the return concerning which you have been testifying?

A. \$11,934.56.

Q. What was the amount which you claim is the correct amount of income that was received by the defendant Sam Ormont for that year?

A. \$30,512.86.

Q. You are talking about the net income?

A. Correct, net income.

Q. Now as to the deductions which were made from the gross income, was there any additional amounts or changes claimed by you over those that were set down by the taxpayer in his income tax return?

A. There were no changes in the deductions.

Q. What is the difference between the two amounts, the amount reported as income tax net in-

(Testimony of J. Bryant Eustice.)

come and the amount which you claim is the correct income tax net income?

A. \$18,057.30.

Q. How much was the tax reported by the defendant Ormont?

The Court: That is for income tax or victory tax? [300]

Mr. Strong: Income tax at this point.

The Court: He has lumped the two together in his figures. I suppose he can figure them out.

Mr. Strong: I would like him to do that, if your Honor has no objection.

The Witness: They are all the way through because that is the way they were reported on the return, as income and victory tax.

Q. (By Mr. Strong): Do your figures show what the income tax net income was that was reported?

A. I don't have them separated any place; no.

Q. Do your work papers show?

A. Not as a separation of income and victory tax, no.

The Court: Victory tax was an increased income tax, wasn't it?

The Witness: It can be computed separately.

The Court: It was an increase in the temporary income tax.

The Witness: Yes, your Honor.

The Court: I do not think he needs to separate it, counsel.

(Testimony of J. Bryant Eustice.)

Mr. Strong: He may do it tomorrow, if it is necessary.

The Court: All right.

Q. By Mr. Strong: Now what was the income tax that was reported? [301]

A. \$3,847.72.

Q. What do you claim is the correct income tax that should have been reported?

A. \$13,461.29.

Q. What is the difference in the tax?

A. \$9,613.57.

Q. Now taking the year 1944, the income tax return of the defendant Sam Ormont for the calendar year 1944, what was the amount of dividends and interest reported by the taxpayer?

Mr. Robnett: I object to this, if the Court please, and any evidence in connection with it, on the ground it is incompetent, irrelevant and immaterial, not within the issues of this case. This is not the return that is alleged in the indictment, and it is at variance from the charges in the indictment. This is the one where your Honor will remember on the question that they have alleged that there was an income and victory tax return made and they have offered or proven no such return.

The Court: Let me see the exhibit, the 1944 tax return.

(The document referred to was passed to the court.)

Mr. Strong: To save time, your Honor, we can leave this and we can take up the other defendant.

(Testimony of J. Bryant Eustice.)

The Court: I think this has to be passed on. The fact [302] is that under the law there was no victory tax during the year 1944.

Mr. Strong: That is right, your Honor.

The Court: The additional allegation in the indictment is surplusage. The objection is overruled.

Mr. Katz: Your Honor please, may I be heard on that with reference to the defendant Himmelfarb?

Mr. Strong: It is not the same allegation as to the defendant Himmelfarb.

The Court: I know, but he has something else to say maybe.

Mr. Katz: I believe in that count both defendants are charged.

The Court: That is right.

Mr. Katz: And consequently I wish to make the objection that the reference there of income and victory tax is a reference to the document that was filed rather than the manner of distributing it. It refers to the filing of a document which is alleged to have been false and fraudulent. And it is my thought that a situation is exactly the same as if the indictment had alleged that an affidavit were false and fraudulent and proof came in that a promissory note was executed.

The Court: No. It alleges a false and fraudulent income and victory tax return. There was no victory return, there was nothing but an income tax return in 1944, so it is [303] merely surplusage. I

(Testimony of J. Bryant Eustice.)

think the defendants are not prejudiced by this. The objection of the defendant Phillip Himmelfarb will be overruled.

This testimony, however, is admissible only so far for the year 1944 in count 1 as against the defendant Sam Ormont only because there has not yet been anything in the evidence to connect the defendant Phillip Himmelfarb with the allegations of count 1.

Mr. Katz: That is my understanding.

Mr. Strong: Yes, that is the same understanding. It hasn't changed yet.

The Court: The jury will be so instructed, and we will proceed.

Q. (By Mr. Strong): Taking the income tax return for the calendar year 1944 of the defendant Sam Ormont, Mr. Eustice, the item of dividends and interest is reported in the sum of \$1,375, is that right?

A. That is the correct amount; \$1375.

Q. Do you claim that there was any extra amount?

A. There was \$1.27.

Q. Where did you find that?

Mr. Robnett: Do you want us to pay it now?

The Witness: I had to tie those figures in and it took \$1.27 to do it. [304]

The Court: Is that what you did, tied them in and added \$1.27?

The Witness: No, your Honor. To balance the bank accounts with the figures I am using on my adjustments as it had been credited to the bank

(Testimony of J. Bryant Eustice.)

account I had to include it as additional income. That was savings account No. 747 at the Bank of America.

Q. (By Mr. Strong): Now as to item No. 5, which is income from business, what is the amount reported on the return? A. \$11,299.57.

Q. Do you have any other figures?

A. I have additional income from the business of \$817.42.

Q. Where did you get those figures?

A. It was deduction made on item 12 of Schedule C of the 1944 income tax return charged to a business expense.

Q. That schedule is part of the document you have?

A. It is part of the income tax return. It is a business schedule of the income tax return.

The Court: You mean you reduced the business expense by \$847 and thus increased the income? Is that it?

The Witness: Well, he increased the expense \$817.42 and thereby reduced the income.

The Court: He reduced his income? This shows an increase [305] of income from business.

The Witness: Well, I am increasing it, adding it back on the report.

The Court: You mean you took it out and then put it back?

The Witness: No, the taxpayer had deducted it on the Schedule C and I am claiming it as an improper deduction.

(Testimony of J. Bryant Eustice.)

The Court: That is what I asked a moment ago.

The Witness: I am sorry.

The Court: In other words, you disallowed one of his deductions?

The Witness: Yes, your Honor.

The Court: Thereby making an increase in his income?

The Witness: Yes.

The Court: What were those disallowances? He reported them, however, did he?

The Witness: Yes, it was charged on the books of the Acme Meat Company as interest and it is charged to interest and credited to an account called accrued interest, Dora Goldberg. The item was further explained as to charge off interest on capital investment of Sam Ormont. [306]

Q. You disallowed that?

A. Yes; it's a non-deductible item of the taxpayer's capital, but it would be reportable as income in any case. It is not allowable as a deduction.

Q. (By Mr. Strong): What, in addition to those adjustments which you made, those additional sums which you gave us of \$1.27, \$817.42, do you claim there was any other income which the taxpayer received during the year, the defendant, Sam Ormont, which he did not report on his income tax return? A. Yes.

Q. How much?

A. There was income not disclosed by the taxpayer of \$23,989.26.

(Testimony of J. Bryant Eustice.)

Q. Do you mean not disclosed on the return?

A. Not disclosed on the income tax return of the taxpayer.

Q. Where did you get that figure?

A. The total figure is made up of the following items: Cash from undisclosed source, deposited to the personal bank accounts, \$8,800.19.

There was United States Government bonds, purchased during 1944, of \$5,750. Part of that payment was income drawn on the taxpayer's personal bank account for \$750; a check drawn on his business bank account of \$2000, or \$2750 which [307] can be traced to funds that did not represent income. The balance of \$3,000 was paid on government bonds from sources that could not be determined, and was not explained by the taxpayer.

There were checks from undisclosed sources deposited to the personal bank account of \$2057.25.

There were receipts from undisclosed sources deposited to the business bank account of the Acme Meat Company, and credited to the taxpayer's capital account of \$9131.82.

There was repayment made of a loan to Phillip Himmelfarb of \$4000. \$3000 of that was a personal check of the taxpayer drawn on his personal bank account, Security First National Bank. The balance of \$1000 could not be traced or explained by the taxpayer.

The Court: You mean it was not explained in his books?

The Witness: No, by him personally.

(Testimony of J. Bryant Eustice.)

The Court: That may be stricken out as a conclusion of the witness, the statement that it could not be explained by the taxpayer, by him personally.

The Witness: The same method of accounting for all the funds of the taxpayer was used in this case as in 1943 and in 1942. In other words, to account for all of the funds that came from known sources; in addition there were funds that came from these unknown sources which were not explained.

Q. (By Mr. Strong): As to the bonds, where did you get the information? [308]

A. As to the bonds that the taxpayer had in his possession?

Q. Yes.

A. From the schedule supplied by Mr. Phoebus, that he had made up, or, I think in connection with another accountant, of the taxpayer.

Q. I could not hear you, Mr. Eustice.

A. The schedule of the bonds was given to me by Mr. Phoebus.

Mr. Strong: May I have this document marked for identification?

Mr. Robnett: I move to strike all the evidence as to bonds upon the grounds that it is hearsay from the witness.

Mr. Strong: We will connect it up.

The Court: The ruling on that will be reserved.

Q. (By Mr. Strong): What was the total amount of net income for income tax purposes that was reported by the defendant Sam Ormont in his income tax return for the current year 1944?

(Testimony of J. Bryant Eustice.)

Mr. Robnett: May it be understood that my objection runs to all of this testimony pertaining to this?

The Court: Yes. That is right. It will be overruled without prejudice to a motion to renew a motion to strike.

A. The corrected—— [309]

Q. (By Mr. Strong): Not about the corrected account, but as to the amount reported, the income.

A. \$12,174.57.

Q. Do you disagree, or do you claim there was anything wrong with the deduction taken on the income tax return?

A. No, there was no changes in the deductions.

Q. How much is the corrected amount of income which you claim the defendant Sam Ormont received during the year 1944?

A. The correct net income was \$36,982.52.

Q. How much is the difference between the two?

A. \$24,807.95.

Q. How much tax did the defendant Sam Ormont report on his return for the year 1944?

A. \$3,626.58?

Q. How much do you claim was the correct amount which he should have reported?

A. \$14,516.54.

Q. Was the correct amount he should have reported in addition to the amount which you gave?

A. The additional amount of tax.

Q. The correct amount should have been how much? A. \$18,143.12.

(Testimony of J. Bryant Eustice.)

Q. I show you Government's Exhibit 42 for [310] identification, and ask you if you ever saw this document before, which consists of seven pages stapled together. A. Yes, I have.

Q. Was that document used by you in connection with your computation with reference to the bonds that you testified about?

A. Yes, it was. I made a schedule from this document here, or this exhibit 42.

Q. Is that where you got your information as to the bonds?

A. That's where I got my information.

Q. You don't know where that came from?

A. It was handed to me by Mr. Phoebus.

Q. It was handed to you by Mr. Phoebus, the agent who is sitting at government counsel's table?

A. That is correct.

Q. Taking the return for the year 1944, of the defendant Phillip Himmelfarb——

Mr. Katz: At this time, if the Court please, I am going to object to the use of the transcript, and I would like, prior to the objection, to examine the witness on voir dire in connection with it.

The Court: What transcript?

Mr. Katz: The working sheets that are being used.

The Court: You mean the so-called working papers? [311]

Mr. Katz: The working papers, yes.

The Court: You may examine the witness on voir dire.

(Testimony of J. Bryant Eustice.)

Voir Dire Examination

By Mr. Katz:

Q. Mr. Eustice, will you please refer to Exhibit 41? I believe those are your working papers in connection with your investigation of Phillip Himmelfarb's account.

A. These here, of course, I have also.

Q. I am not referring to the summary. I am referring to your working papers.

A. Yes.

The Court: You identify those as your working papers?

The Witness: Yes, they are the original work papers.

Q. (By Mr. Katz): Did you prepare all of those papers yourself?

A. I think I can say the answer is no.

Q. Some of those are in the handwriting of some other person other than yourself?

A. Yes, that is correct.

Q. In the preparation of those working papers that you are using did some other agent, or other agents copy certain records?

A. Yes, that is correct.

Q. Did you in every instance see the original of the records that they copied? [312]

A. No, I do not believe I have so testified.

Q. The working papers you have there refer to, and in part are copied from documents that you had never seen, and never examined yourself?

(Testimony of J. Bryant Eustice.)

A. Part of these. Part of the items that are in these working papers are those exhibits that I mentioned at the time that I had not examined personally.

Q. Do you know of your own knowledge that the matter set forth in the working papers that you intend to refer to are correct?

A. Not all of them.

Q. You have never checked those that were prepared by others against the original records to determine whether they are or are not true and correct?

A. That is true in one or two cases.

Q. Are you in a position to say that the documents that you yourself prepared are true and correct?

A. I don't believe I understand your question.

Q. With reference to any of the working sheets that you prepared yourself, and which were not prepared by others, are you in a position to state that they are absolutely true and correct?

Mr. Strong: I don't understand that question, your Honor.

The Court: I can understand it. Do you understand it? [313] It has got to be pretty simple for me to understand it.

Mr. Strong: And it has to be simpler for me.

The Witness: To the best of my knowledge, any accounts I have copied, or any computations that I have made, they are correct.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Katz): Did you prepare the transcript of the bank account at the First and Chicago branch of the Bank of America, which I believe is a part of the working papers that you are now looking at?

A. I copied the bank account from December 24, 1942, to January 24, 1944.

The Court: That is the bank account of whom?

The Witness: Of Phillip Himmelfarb.

Q. (By Mr. Katz): Until January 24, 1944?

A. Until January 24, 1944. From that date to January 22, 1945, the bank account was copied by Mr. Phoebus at the same time, and at my request.

Q. Did you at any time check the working papers prepared by Mr. Phoebus against the original records from which they were copied to determine whether those were true and correct?

A. Do you mean did I take these and compare them?

Q. Compare it to see that he had correctly copied them? [314]

A. No, I did not.

Q. At any rate, Mr. Eustice, if any mistakes were made with respect to the items in May of 1944, August of 1944 and December of 1944, with respect to copying that account, those mistakes would not have been made by you?

A. Can I explain that?

Q. Was that within the period prepared by Mr. Phoebus?

(Testimony of J. Bryant Eustice.)

The Court: He just testified it was. The witness has not answered the question. Read counsel's question again.

(Question read by the reporter.)

The Witness: I asked if I could make my own statement.

The Court: No. You can answer it yes or no.

The Witness: May I have the question again, please?

(Question again read by the reporter.)

The Witness: If any mistakes were made, they would not have been made by me, no.

The Court: During that period.

The Witness: During that period, that is, as far as the copying of this particular bank account is concerned.

Q. (By Mr. Katz): Mr. Eustice, do you know of your own knowledge what sources of information were checked by anyone other than yourself who prepared any of these working papers?

A. That is, where they got the information?

Q. Yes. Do you know of your own knowledge where they [315] got the information, other than what you yourself obtained?

A. Only by what they told me.

Q. Other than from what they told you, you would not know?

A. That is, if I did not examine the record myself.

(Testimony of J. Bryant Eustice.)

Q. Any of the information that was obtained in the working papers, whether by you, or anyone else, based upon any information or source other than and different than the exhibits that have been presented here, and introduced and admitted as against the defendant Himmelfarb? Do you know which those are?

The Court: While he is looking at that, will you read that question up to now, Mr. Reporter?

(Question read by the reporter.)

Mr. Strong: I understand that.

The Court: You stopped in the middle of the other question, and asked him another one.

Mr. Katz: That is correct, your Honor. I withdraw both questions, if the court please, and will ask the witness if he knows which of the exhibits that are here before him have been presented and introduced as against the defendant Himmelfarb?

Mr. Strong: Do I understand that that calls for him to recall which exhibits were admitted against Himmelfarb?

Mr. Katz: No, just pick them out. They are all before him. [316]

The Court: I do not know that they will be admitted or not.

We will recess until 10:00 o'clock tomorrow morning. Remember the admonition.

(Whereupon, at 4:45 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, May 28, 1947.)

Los Angeles, California, May 28, 1947

10:00 o'Clock A.M.

The Court: Ex parte?

The Clerk: Yes.

(Other court matters.)

The Court: United States v. Ormont and Him-
melfarb.

Mr. Strong: Ready for the Government.

Mr. Katz: Ready.

Mr. Robnett: Yes, your Honor.

The Court: Usual stipulations?

Mr. Strong: Usual stipulation.

Mr. Katz: So stipulated.

Mr. Robnett: Yes, your Honor.

The Court: Proceed, Mr. Strong. There was a
witness on the stand.

J. BRYANT EUSTICE

the witness on the stand at the time of adjournment,
resumed the stand and testified further as follows:

Mr. Katz: If the Court please, Exhibit 36,
which was first marked for identification and a por-
tion of that subsequently admitted in evidence, I
am going to request the Court, in order to eliminate
confusion, to mark the exhibit that was admitted
in evidence as 36-A and that portion of it which
is still marked only for identification as 36-B.

The Court: All right. [321]

Mr. Katz: Thank you.

The Court: Do you want it in evidence?

Mr. Katz: Pardon me?

(Testimony of J. Bryant Eustice.)

The Court: 36-B is now in only for identification.

Mr. Katz: Yes. It has always been. It has never been admitted in evidence, and all we ask is that they be segregated so that we know which is in evidence and which is not rather than include them all together under one number.

The Court: Very well.

I think some witness was directed to return at 10:00 o'clock this morning for further cross examination in connection with some records. Have those records been supplied the defendants?

Mr. Robnett: No, your Honor.

Mr. Katz: The witnesses are here with them, I believe.

The Court: If you will step down we will conclude on those matters so that these witnesses can go about their business.

HUGH R. PINGREE

recalled as a witness by and in behalf of the Government, having been previously duly sworn, was examined and testified as follows:

The Court: You were sworn the other day?

The Witness: Yes.

The Court: And you are? [322]

The Witness: Hugh R. Pingree; Bank of America.

The Court: You were to bring some additional records and data?

The Witness: That is right.

(Testimony of Hugh R. Pingree.)

The Court: Have you brought them?

The Witness: Yes.

The Court: The defendants were asking for them. I have forgotten what you were asking for.

Mr. Robnett: Yes. I would like to see them.

The Witness: There is one thing that I have discovered here, Judge. Our original cards showed the account as opened in May of 1942, May 14. I find that that is a typographical error, and it should be March 14. I have brought the records from the opening date of March 14 of '42.

The Court: Is there a card in evidence?

The Witness: There is a photostatic copy that shows it; yes.

The Court: That will be Exhibit 32. Is this the one?

The Witness: That is right; that is correct. That is a typographical error. It should be March.

The Court: March 14?

The Witness: Yes, instead of May.

The Court: 1942?

The Witness: Yes.

The Court: Very well. [323]

The Witness: And I have brought the records from the opening date of March '42 through December 23 of '43.

The Court: And they are in the record already from December 23?

The Witness: Through the year '45.

The Court: All right. These are transcripts of them?

The Witness: Yes. They are certified copies.

(Testimony of Hugh R. Pingree.)

The Court: This will be marked—that was 36—this will be marked 36-C for identification.

(The document referred to was marked Government's Exhibit No. 36-C for identification.)

The Court: That was all the records you were supposed to bring?

The Witness: Yes.

The Court: Any other questions?

Mr. Robnett: I don't remember if he was requested to bring any records of Sam Ormont.

Mr. Katz: No. Those are records of Phillip Himmelfarb, and I believe the Court has asked all the questions necessary.

The Court: This witness may be excused?

Mr. Katz: Yes.

The Court: Permanently?

Mr. Katz: Yes.

The Court: Mr. Strong?

Mr. Strong: Yes. I have no further use for him.

(Witness excused.)

Mr. Strong: I don't know why 36-B was not in evidence.

The Court: It was only offered between certain dates.

Mr. Strong: I have no objection, if the defendants want them, to have all the records that they think are necessary to go in. I wouldn't object to that.

The Court: They are here for identification. Maybe at the appropriate time they may be offered.

Very well.

JAMES E. McCLUNG

recalled as a witness by and on behalf of the Government, resumed the stand and testified further as follows:

The Court: Your name was?

The Witness: J. E. McClung.

The Court: And you are from the Security Bank at Huntington Park?

The Witness: Yes.

The Court: You were sworn the other day?

The Witness: Yes, sir.

The Clerk: Is No. 36-C in evidence?

The Court: No, just marked for identification.

JAMES E. McCLUNG

a witness recalled by and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Robnett:

Q. Have you brought this morning all of the ledger sheets of the Sam Ormont account or accounts in your bank? A. Yes.

Q. From the beginning?

A. The beginning, 1932 and up to the current date.

Q. '32 was when it was opened?

A. That's right, January 22, 1932. That's the Acme Meat.

Q. Those are the originals that you have here, are they?

(Testimony of James E. McClung.)

A. These are. These are ledger sheets. These are the signature cards.

Mr. Robnett: Do you want to see them, counsel?

Mr. Strong: No. Are they bank records.

Mr. Robnett: Original bank records.

Mr. Strong: That is satisfactory.

The Court: Do you have copies of them?

The Witness: These are the originals.

The Court: Have you made copies?

The Witness: No. Then I have the original ledger [326] sheets, the complete record of Sam Ormont.

Q. (By Mr. Robnett): From the beginning of the account? A. That's right.

Q. Those are originals?

A. Those are. That's the only record we have of these. You called for deposit tickets and withdrawals of his savings account, and that is a complete record of the debits and credits,—the originals.

Mr. Robnett: I will take these up first then. I will ask at this time that the ledger sheets of Sam Ormont's account be marked as our next exhibit.

Mr. Strong: I have no objection to those going in as part of the others, A and B, so they can be kept together. I think it will be easier that way.

Mr. Robnett: I prefer to keep them separate.

The Court: They will be marked for identification Defendant Ormont's exhibits.

The Clerk: Do you want these as one exhibit, Mr. Robnett?

(Testimony of James E. McClung.)

Mr. Robnett: Yes, please. The deposit slips and withdrawal slips of Sam Ormont, of his savings account in the same bank, which seem to bear the number 224808; is that correct?

A. That's right.

Mr. Robnett: I would like to have these marked as the next exhibit for the defendant Sam Ormont. [327]

The Court: For identification or in evidence?

Mr. Robnett: For identification.

The Clerk: J for identification.

(The documents referred to were marked as Defendant Sam Ormont's Exhibit J for identification.)

Q. (By Mr. Robnett): Mr. Witness, this bunch that has this rubber band around it, I assume is complete of the account that that refers to, the Acme Meat Company, or do these others go with them?

A. These go with them in order, like this. They are in order, on the date starting 1932, and ending here at the bottom.

Q. The small ones?

A. That's right. There was a change in form from the large to the small. These are the original entries.

Q. And these are the ones of the Acme Meat Company, or rather of Sam Ormont doing business under the firm name and style of the Acme Meat Company?

A. That's right.

(Testimony of James E. McClung.)

Q. These cards are signature cards?

A. That's right.

Q. When the account was first opened, it was shown to be Ormont and Salter?

A. That's right. Here is his current file. You did [328] not ask for this, but I brought it; I thought I had better bring along the current account. This account is closed out.

Q. When you say current account, it is for the corporation? A. Yes.

Q. Under the name of Acme Meat Company?

A. Yes, that is the corporation. This is under the company. I don't think they were incorporated at the time.

Mr. Robnett: I am asking to have this entire group, with the signature cards, being those of the Acme Meat Company received.

The Court: Let them be marked, the signature cards being K.

The Clerk: Do you want to make them one or two cards?

The Court: Two cards, K-1 and K-2. The others will be L.

(The documents referred to were marked as Defendant Sam Ormont's Exhibits J, K-1, K-2 and L, and were received in evidence.)

Mr. Robnett: There are two groups of ledger sheets. They all go together, however.

The Court: All right.

The Clerk: They will be L.

(Testimony of James E. McClung.)

Q. (By Mr. Robnett): This one of the corporation, that is not necessary, Mr. Witness. Thank you. [329]

Did you bring with you all of the ledger sheets of any and all savings accounts of Mr. Sam Ormont with your bank?

A. I left those last Friday when I was here, I believe it was. They are the ones in evidence already.

Q. They are here?

A. Those are. Today I brought additional deposit tickets, and credit tickets, to go with that card I left here.

Q. The ledger sheets were brought at that time?

A. Yes. There was just one card, a white card.

Q. Were those ledger sheets for the entire account from the time it was opened?

A. That's right.

Q. Did you bring with you, either the other day or today, all of the ledger sheets of the commercial personal account of Sam Ormont? A. Yes.

Q. These are some that you put in this morning?

A. Yes. I have the complete file of both accounts, all the way.

The Court: Three accounts?

The Witness: Yes.

The Court: Personal commercial account, Acme Company's account, and Ormont savings account?

The Witness: They are all here, every one of them.

Mr. Robnett: That is all. [330]

(Testimony of James E. McClung.)

The Court: It will be stipulated, I suppose, that the original bank record may be withdrawn and a copy substituted?

Mr. Robnett: Yes.

Mr. Strong: Yes. [331]

Mr. Strong: This other document which you brought with you, the two documents, what are those?

The Witness: That is an account under Acme Meat Company, Inc. It was not asked for. It is a new account in our branch, and I tried to get Mr. Robnett on the phone three times——

Mr. Strong: I just want to know what it is.

The Witness: It is a ledger sheet showing entries on a new account we have under Acme Meat Company, Inc.

Mr. Strong: What is this card?

The Witness: That is the signature card with the account.

Mr. Strong: I would like to have these marked for identification, your Honor.

The Court: Any objection?

Mr. Robnett: Yes, I object to them on the ground, if the Court please, that those are all after any time involved in this action.

Mr. Strong: I haven't offered them yet.

Mr. Robnett: And they are on a corporation.

Mr. Strong: A lot of these records that were brought in and marked for identification by defense counsel I understand are also after the date.

The Court: And so were some of yours.

(Testimony of James E. McClung.)

Mr. Strong: Yes. This is just another one. [332]

The Court: I think this is probably too remote. I cannot see any materiality to this.

Mr. Strong: I may be able to tie it up. I am simply asking that it be marked for identification so it is available if necessary.

The Court: It can be marked for identification and left here as——

The Clerk: No. 43.

(The document referred to was marked Government's Exhibit No. 43 for identification.)

The Court: Any other questions from this witness?

Mr. Strong: Not from me.

The Court: You may be excused. I suppose you want a receipt from the Clerk?

The Witness: Yes, please.

The Court: All right. Just step down and you can get it later.

(Witness excused.)

The Court: Mr. Eustice, will you resume the stand?

J. BRYANT EUSTICE

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

The Court: Do you have other matters?

Mr. Katz: No, this is on the continuation of the voir dire examination. [333]

The Court: Very well.

(Testimony of J. Bryant Eustice.)

Voir Dire Examination

(Continued)

By Mr. Katz:

Q. Mr. Eustice, I believe you now have before you Exhibits Nos. 32, 33, 34 and 35 which you did not personally examine, at least you never examined the original of those exhibits. That is correct, isn't it?

A. I don't have Exhibit 32 here.

Q. I now hand you Exhibit 32.

A. What was the question?

(The question referred to was read by the reporter as set forth above.)

The Witness: That is correct.

Q. (By Mr. Katz): You also have before you Exhibits 36-A and 36-B. Now with reference to Exhibit 36-A, you copied that part of that exhibit for the period from December 24, 1942 to January 24, 1944. That is correct, isn't it?

A. That is correct.

Q. That portion of Exhibit 36-A from January 24, 1944 to the termination date shown on that exhibit was copied by Mr. Phoebus, isn't that correct? A. That is correct.

Q. And the last date that is shown on that is March 22 of 1945? A. That is correct. [334]

Q. Now with reference to Exhibit 36-B, was all of that copied by Mr. Phoebus too or by someone else other than yourself?

A. That was copied by somebody else, yes, other than myself.

(Testimony of J. Bryant Eustice.)

Q. Do you know whether or not that somebody else was Mr. Phoebus or still someone other than Mr. Phoebus?

A. My work papers are there. I think I can say very definitely it was Mr. Phoebus.

Q. What is the last date that is shown on Exhibit 36-B? A. January 23, 1946.

Q. I hand you Exhibit 41 for identification, which are your working papers, Mr. Eustice, and with reference to those will you tell me what is the last date shown on your working papers that purport to be the transcript of Exhibits 36-A and 36-B?

A. I have a copy of 36-B, I think what is marked 36-B here.

Q. Can't you look at the beginning and ending dates on the transcript of that account and tell us for the period for which that transcript was made?

A. You mean this 36-A?

Q. 36-A and B.

A. This is a continuation of the same account here. I see there are two separate parts. That is what was a little [335] confusing here. As I say, I didn't copy this particular account.

The Court: You did not copy any portion of that account, of the Phillip Himmelfarb account?

The Witness: That is right, your Honor.

The Court: That is the answer to your question. He did not copy any portion of it, he said.

Mr. Katz: He didn't copy any portion?

The Court: Any portion of the Phillip Himmelfarb account.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Katz): You didn't copy any part of that?

A. No, not from this account at First and Chicago Branch.

Q. I understood from the testimony yesterday that you had copied a part of that. If you so testified, that was in error?

A. There was another account here which I was looking at and reading from at that time.

Q. Let's see if we don't get on to that in just a bit, Mr. Eustice. Let me ask you this—

A. I beg your pardon. I think probably you are right. I had in mind that that account was not at First and Chicago. And another reason of course is that I haven't this so fixed in my mind because I didn't use any of these accounts in the determination of Mr. Himmelfarb's income. [336]

Q. You did not use those records in making any such determination? A. That is correct.

The Court: You had no recourse to them at all?

The Witness: I had just for information, but I mean in the actual determination of his income.

The Court: You did use them for information?

The Witness: For information; yes, your Honor.

Mr. Strong: May we have the witness state what records he is talking about?

The Court: He is talking about the transcript of the bank account of Phillip Himmelfarb at the First and Chicago Branch of the Bank of America. Is that right?

The Witness: Yes.

(Testimony of J. Bryant Eustice.)

Mr. Strong: For what period, your Honor?

The Court: Any period.

Mr. Strong: I don't know that the witness understood that to be the question.

The Court: What period did you use for information?

The Witness: Well, I made just an examination of the whole account but I didn't actually use it in the computation of the taxpayer's correct income.

The Court: All right.

Q. (By Mr. Katz): Mr. Eustice, will it help you if I tell you that [337] the transcript of that account as shown in your working papers——

A. Yes, I have it here now. Thank you. The last date on here was December 19, I believe—I will check and be sure of that—1945. Yes, that is correct.

Q. December 19, 1945 is the last date?

A. Yes.

Q. And the first date is December 24, 1942?

A. That is correct. [338]

Q. Now, is it still your testimony that you did not copy any part of that?

A. I copied from December 24, 1942 to January 24, 1944.

Q. You did copy a part of that record?

A. That's correct.

Q. What was actually done, you went to the bank and got these statements or ledgers, and you took part of them, and gave part of them to Phoebus, and each of you sat down and copied the part that you got, is that correct?

(Testimony of J. Bryant Eustice.)

A. That is right.

Q. You did not examine the part he received and copied from, nor did he examine the part that you received and copied from, is that correct?

A. Yes. I did not check it in detail.

Q. You did not check his work back at all, did you?

A. No, not what you would call a check-back on it.

Q. You did not verify the figures he copied by checking those against the originals?

A. That's right.

Q. And he did not check the figures you copied by checking your figures against the originals?

A. That's right. We put the balance, to know whether they were correct or not.

Q. You put the balance down from the ledger sheets?

A. And as we go along, probably every week, or every [339] month, we put in the balance shown in the bank account, to show whether those figures are taken off of the bank account.

Q. Your working papers include a purported transcript of an account in the name of the defendant, Phillip Himmelfarb, with the Bank of America, Santa Fe Branch, do they not?

A. The savings account you refer to?

The Court: Any account.

Q. (By Mr. Katz): Any account.

A. Savings account No. 8136, Bank of America, 3801 Santa Fe Avenue.

(Testimony of J. Bryant Eustice.)

Q. And a record of a commercial account?

A. Yes, in the name of Phillip Himmelfarb, doing business as Phillip's Meat Company.

Q. With reference to the first, the savings account that you mentioned, Mr. Eustice, Exhibits 32, 33, 34, 35 and 36, or any other exhibits before this Court, do they constitute a record or copies of a record of the savings account at the Bank of America, Santa Fe Branch?

A. If I understand your question, you mean these exhibits do not have any connection with this particular bank account?

Q. What I am referring to is this, Mr. Eustice: You have a transcript there with reference to matters which are not in evidence here, both by way of original records, or [340] photostatic copies of such records.

The Court: They are not records in evidence here from the Santa Fe Branch of the Bank of America?

The Witness: These exhibits do not apply to that.

Q. (By Mr. Katz): Who prepared the transcript of that savings account of the Bank of America, Santa Fe Branch?

A. I made that transcript.

Q. All of it? A. All of it.

Q. You made this from original records?

A. From original records at the bank.

Q. With reference to the transcript of the commercial account in the name of Phillips' Meat Com-

(Testimony of J. Bryant Eustice.)

pany, or Phillip Himmelfarb, doing business as Phillip's Meat Company, who made the transcript of that account?

A. I made it all complete.

Q. It is all in your handwriting, and likewise with reference to that account there are no exhibits here that you have seen, or heard presented here, that in any way refer either to the original records, or copies of those records—the commercial account you have just mentioned, of Phillip Himmelfarb, or the Phillip's Meat Company?

A. That is correct.

Q. Your working papers also include a purported [341] transcript of an account in the name of Morris Rose or Ruth Himmelfarb, a savings account at the Bank of America, First and Chicago Branch, a joint account in the name of Morris Rose and Ruth Himmelfarb, doesn't it?

A. I will say it does. I have it indexed here, yes.

Q. I would like for you to look at this time at the transcript, and tell me if the transcript of that account was made by you?

A. Yes, that account is all in my handwriting too.

Q. You prepared all of it? A. Yes.

Q. It is likewise true, with reference to that account, that there are no exhibits before this Court, either as original records, or copies of the records of the account of Morris Rose or Ruth Himmelfarb, in the savings account of the Bank of America?

(Testimony of J. Bryant Eustice.)

Mr. Strong: That is objected to, that question, as well as the others, because these accounts weren't used by the witness. What difference does it make whether they are here or not? We are not relying on them.

The Court: The objection will be overruled. Read the question.

(Question read by the reporter.)

A. That's correct.

Q. (By Mr. Katz): Your working papers also include, and I believe it [342] is the last page of your working papers, an inventory of certain items of personal property, documents, in the possession of the defendant Himmelfarb, is that correct?

A. That is correct.

Q. That inventory is not in your handwriting, is it?

A. No, it is not.

Q. You did not make any part of it?

A. No part of it.

Q. You were not present when that inventory was taken, were you?

A. No, sir.

Q. You didn't see any of the items of personal property, or examine any of the documents or papers that are listed in that inventory, did you?

A. No, sir.

Q. Are there any other matters, Mr. Eustice, which are included in these working papers, which were obtained by a person or persons other than yourself, that have not already been mentioned here by you?

(Testimony of J. Bryant Eustice.)

A. Well, there is a piece of paper here showing rental expenses, which was presented to me by the taxpayer himself.

Q. Presented to you?

A. Yes, sir. Do you want all these miscellaneous——

Q. Whatever items you have in there that were obtained by someone other than yourself. [343]

A. There was a request for an income tax return. That is prepared by Mr. Phoebus; his memorandum on the telephone conversation with Mr. Mailin.

Q. That was a telephone conversation by whom?

A. It is in Mr. Phoebus' handwriting.

Q. It is in Mr. Phoebus' handwriting?

A. I presume it is by him.

Q. With a person who is not connected with this case as a party, is that correct?

Mr. Strong: I object to that question. That remains to be determined.

Mr. Katz: It is getting a little late in the day.

The Court: I would think so.

Mr. Strong: He said not connected with this case.

The Court: As a party. He certainly is not the United States Government.

Mr. Strong: No, not yet.

The Court: And we already have the defendants identified. You may answer the question, if you know.

A. I don't know as I understand the question.

(Testimony of J. Bryant Eustice.)

Q. Was Mailin a party to this case?

Mr. Strong: I will stipulate he is not a party.

A. No. [344]

Q. (By Mr. Katz): Any other documents or records there made by anyone other than yourself?

A. There are three pages of memorandum here that was made by Mr. Phoebus.

Q. And does that about cover all of the items in that transcript, those working papers?

A. Yes. Anything else is just miscellaneous figures.

Q. Now, Mr. Eustice, it is true, isn't it, that the work sheets made by any person other than yourself won't refresh your recollection as to any original documents that you had never examined or hadn't seen?

A. I don't think of any instance where it would.

Q. You can't think of any instance in which your——

A. I may later.

Q. ——in which your recollection may have been refreshed by someone else with respect to something you had never seen?

The Court: That is the question you just asked, and he answered it.

Mr. Katz: Yes, your Honor.

Q. Mr. Eustice, some of the information included in your working papers is based upon what some person or persons told you, or your associates, is it not?

A. Yes, what they told me in the *handing me* of the [345] records.

(Testimony of J. Bryant Eustice.)

Q. Now would you refer to your transcript of the bank account at the Bank of America, First and Chicago Branch, of Phillip Himmelfarb and to the exhibits 36 and 36-A, and I will ask you to look at 36-B, and tell me if that exhibit shows a deposit on May 18, 1944, in the sum of \$50.

Mr. Strong: I object to this. Now we are going into the substance. I thought this was voir dire as to the documents.

The Court: It is. Objection overruled. Voir dire as to the competency of this witness to testify concerning the matters which are in his report.

Mr. Strong: Concerning the matters which he used as a basis for what he testified to. He hasn't been shown that he has used any of this.

The Court: The objection is overruled.

The Witness: What was the date, Mr. Katz?

Q. (By Mr. Katz): On May 18, 1944, a deposit of \$50.

A. You are asking me, is that on the transcript?

Q. I am asking you if you find it first on Exhibit 36-A or B—probably it will be in B.

A. May 18, 1944?

Q. Yes.

A. It is on the ledger card. [346]

Q. Is it? A. Yes, sir.

Q. Now will you take a look in your transcript of that account and tell me whether your transcript shows an item on May 18 of 1944 of a deposit in the sum of \$50.

A. Not on the transcript.

(Testimony of J. Bryant Eustice.)

Q. There is none?

A. There is no deposit, no \$50.

Q. All right. To the extent that that transcript that was made by you and Mr. Phoebus together——

A. Could you please make that definite? I think the record shows who made the transcript. Of course it wasn't used anyway.

Q. I will withdraw that.

To the extent——

The Court: The witness says it wasn't used. You did have recourse to it for information, did you not?

The Witness: Yes, to see whether or not I was going to use any part of it.

The Court: For information.

The Witness: Yes, to see whether it was going to be essential in the examination. I determined that it wasn't essential.

The Court: If it was used for information, it was used.

Q. (By Mr. Katz): Now, Mr. Eustice, to the extent that [347] the transcript fails to show and record the \$50 deposit made on May 18, 1944, as shown by the bank account records, the transcript is in error, is it not?

A. Yes, there would be \$50 more.

Q. It is inaccurate and incorrect to that extent, isn't it?

A. Yes, sir.

Q. Now will you take a look at your bank record for August 2, 1944, and tell me if you have a deposit there in the sum of \$30 for that date?

A. No \$30—there is \$30 on the account, yes.

(Testimony of J. Bryant Eustice.)

The Court: But none in your transcript?

The Witness: It is not in the transcript.

Q. (By Mr. Katz): It is again true, is it not, Mr. Eustice, that to the extent that that item appears in the original record of that account and does not appear in your transcript, that your transcript is incorrect and inaccurate to that extent?

A. Yes, this transcript would be inaccurate to that extent.

Q. I will now ask you to look at your transcript first and tell me if that shows a deposit on December 1, 1944, in the sum of \$50.

A. December 1, '44?

Q. Yes. [348]

A. There is no deposit on the ledger card.

Q. There is in your transcript, isn't there, under that date? A. There is an item of \$40.

Q. It is an item of \$40 in your transcript, is that right? A. In this transcript.

Q. And there is no corresponding item of \$40 on that date in the original record from which that transcript purports to be a transcript, is that correct? A. That is correct.

Q. And it is again true, is it not, that your transcript is incorrect and inaccurate to the extent of that item?

Mr. Strong: Objected to because we don't use that item. There is no showing we intend to use it and this is on a collateral matter.

The Court: The objection is overruled, and the jury instructed to disregard the remarks of counsel

(Testimony of J. Bryant Eustice.)

that they haven't used it. If this witness used that for the purpose of getting information, it was used.

Mr. Katz: Will you read the question, Mr. Reporter?

(The question referred to was read by the reporter, as follows:

("Q. And it is again true, is it not, that your transcript is incorrect and inaccurate to the extent of that item?") [349]

The Witness: That is correct.

Q. (By Mr. Katz): Mr. Eustice, I will now ask you to check your transcript again under date of September 13, 1944, and tell me whether or not the transcript shows the issuance of a check in the sum of \$87.78 on that date.

A. September 13, 1944?

Q. Yes.

A. What is the question, please?

Q. Does your transcript show a check in the sum of \$87.78 on that date?

A. No, it does not.

Q. Will you take a look at the bank record and tell me if the bank record shows a check in the sum of \$87.78?

A. On September 14?

Q. On September 14. A. Yes, sir.

Q. \$87.78? A. That is correct.

Q. Your transcript shows no such item?

A. That is correct.

Q. To the extent that your transcript fails to show the item in the amount of \$87.78 that appears

(Testimony of J. Bryant Eustice.)

in the original records of the bank account of which that transcript purports to be a transcript, your transcript is inaccurate and incorrect, [350] is it?

Mr. Strong: So stipulated.

Mr. Katz: I will accept that stipulation.

Q. Mr. Eustice, do you believe that if a little more time were allotted for the purpose of checking and verifying those figures in your transcript that it is probable that other and further errors will be discovered?

Mr. Strong: Objected to, your Honor.

The Court: Objection overruled.

The Witness: I wouldn't testify as to the accuracy of any report if I didn't use the figures in my computations. Where I have used the figures in my computations, and if I had used these, these errors would have been discovered.

Mr. Katz: I move to strike that, if the Court please, as a conclusion of the witness, as to whether they would or would not have been discovered.

The Court: It may be stricken, and the jury instructed to disregard it.

The Court: Read the question to the witness.

(The question referred to was read by the reporter, as follows:

("Q. Mr. Eustice, do you believe that if a little more time were allotted for the purpose of checking and verifying those figures in your transcript that it is probable that other and further errors will be discovered?") [351]

(Testimony of J. Bryant Eustice.)

The Witness: I can't answer that question.

The Court: You haven't verified them, is that it?

The Witness: None of these items that he refers to is any part of the transcript that I took off from the bank.

The Court: Very well.

Q. (By Mr. Katz): It is likewise true, isn't it, Mr. Eustice, that the part of the transcript that you took off, you copied and never did check back to verify the figures that you copied against the documents from which you copied them?

A. I never checked back or used it when I completed it. I knew it wasn't essential in the examination.

Q. And you weren't depending upon it at all for its accuracy, were you?

A. That is correct.

Q. And you know that it isn't accurate, don't you?

A. To the extent that you have drawn my attention to it here.

Q. And to the extent of any other errors that may be in there?

Mr. Strong: That is speculative.

The Witness: I don't know that there are any other errors in that.

Q. (By Mr. Katz): You never checked to determine that, is that correct? [352]

A. I have never checked it.

Mr. Katz: No further questions.

(Testimony of J. Bryant Eustice.)

Direct Examination

(Continued)

By Mr. Strong:

Q. Mr. Eustice, in making your examination into the income tax return for the year 1944 for Mr. Phillip Himmelfarb, did you look into other documents and sources that haven't been brought out here at all? You can answer that yes or no.

A. Yes, sir.

Q. And did you look at other papers and documents which aren't in this court room at all?

A. It is possible I did; yes.

Q. Did you have discussions with the defendant?

A. I had discussions with the defendant; yes, sir.

The Court: If there are any other papers upon which he bases his conclusions, they should be brought into the court room, because the method here of having an Internal Revenue Agent getting up to testify as to what his conclusions and his findings are from what he found from here and there is a method which is recognized as shortcutting the usual method of proving a fact in court, to produce the original documents and all of the people. Therefore the greatest latitude should be allowed in testing the accuracy, and if there is any document at all from which he took any information concerning this investigation they should be produced and disclosed. [353]

Mr. Strong: That is precisely my point, your Honor, as to any document on which he relied in reaching these conclusions. My point is that he didn't allow——

(Testimony of J. Bryant Eustice.)

The Court: It isn't a question of what this witness relied upon. The jury are going to decide whether he is right or wrong. If it was this witness' sole conclusion as to what he relied on there wouldn't be any use of having a trial.

Mr. Strong: But, your Honor, that is precisely my point, that the amount which he is going to testify has nothing to do with these items. That is why I objected that it is immaterial.

The Court: The jury will disregard the statement of counsel. They will have to decide what has to do with what. Proceed with your examination. [354]

Mr. Strong: Very well, your Honor.

Q. As to these bank accounts which were testified to by you here, of which you have entries in your records, in making your determination as to the income tax, or the income for the year 1944 reported by Mr. Himmelfarb, did you take those bank records, and those figures, into account?

A. No, sir, I did not.

Q. As to the Bank of America account, that counsel asked you about, which you have on your work papers, did you take any figures from that account into account in making a determination as to the income of the defendant Himmelfarb for the year 1944?

A. No, sir, I didn't.

Q. The Security First National account, which you testified about, of which you have some entries in your work papers?

(Testimony of J. Bryant Eustice.)

Mr. Katz: That is objected to, your Honor. There is no Security First National.

Q. (By Mr. Strong): The Santa Fe Branch, did you take any of those figures into account?

A. No, sir, I didn't.

Q. The account that was referred to here, the savings account of the defendant, did you take any of those figures into account in determining what his net income was for the year 1944? [355]

A. No, sir, I did not.

Q. And did you use any of this so-called transcript which you referred to here, the figures made by Mr. Phoebus, in determining what the defendant's net income was for the current year 1944?

A. No, sir, I did not.

Q. Will you state what records, what documents you did use in determining what the defendant's net income was for the year 1944?

A. The income that the taxpayer, or Mr. Ormont had——

Q. This is Mr. Himmelfarb.

A. What was called a partnership return, for a fiscal period, which is in evidence here, showing so much income which had been collected during the period covering that fiscal period.

Q. I show you Government's Exhibit No. 6. Is that the return that you are referring to, so-called fiscal year return?

A. Yes, sir, that's correct.

(Testimony of J. Bryant Eustice.)

Q. What other documents and records did you use in ascertaining Phillip Himmelfarb's income for the current year 1944?

A. The books of the Acme Meat Company.

Q. Those were made available to you by whom?

A. By Mr. Ormont.

Q. What other documents and books and records that you [356] used?

A. I don't believe there were any.

Q. You have that document in front of you, which you used here, the summary. Will you look at that, and see if there were any other documents that you used besides this income tax return, Government's Exhibit 6, that you testified to, besides the books and records of the Acme Meat Company,—any other books and records or documents in addition to those two, that you may have used in ascertaining the income of the defendant Himmelfarb for the year 1944?

Mr. Katz: If the Court please, with reference to that summary, as I understood it from the testimony of this witness, they were summaries of the matters they arrived at. They used working papers. I object to the use of the working papers. I object to the use of any summary based upon any working papers.

Mr. Strong: This is on voir dire. We are discussing the income used in the working papers. All I want to know is what documents he used so that we can go into the competency of the papers.

(Testimony of J. Bryant Eustice.)

The Court: This then is still preliminary?

Mr. Strong: Yes.

The Court: All right. You remember the question?

The Witness: I believe so, your Honor.

Q. (By Mr. Strong): In other words, I want to know all the books and [357] records which you used in determining the income of the defendant Himmelfarb for the year 1944. You have given already the income tax return, which is Government's Exhibit 6. You have already stated the books and records of the Acme Meat Company.

The Court: When you say he used, do you mean he had recourse to them?

Mr. Strong: What he actually used.

The Court: What he used to determine the income is a mental process. If he got information from some place, he used it.

Mr. Strong: I mean like the work papers.

The Court: He used it then?

Mr. Strong: That I refer to as having recourse, and using it in determining the income. What he relies on.

The Court: Use the word "rely" instead of "used," because everything he looked at he used.

Mr. Strong: I will use the word "rely."

Q. Will you state what documents and records you relied on in order to determine the income of Phillip Himmelfarb for the current year 1944, enumerating them one by one?

(Testimony of J. Bryant Eustice.)

A. Well, I relied for the additional income, that is, one phase of it, on this return that we have here, Exhibit 6.

Q. Government's Exhibit 6.

A. Exhibit 6. [358]

Q. What else?

A. And the account of Phillip Himmelfarb on the books of the Acme Meat Company.

Q. That you testified to before?

A. Yes, sir.

Q. Any other books or records, or documents of any kind that you relied on?

A. I used the slip of paper that Mr. Himmelfarb gave me himself regarding his rental income, which is not a large item.

Q. Do you have that?

The Court: That is, using the account of Phillip Himmelfarb on the books of the Acme Meat Company, you used in that connection the books and records of the Acme Meat Company, to verify that, did you? A. Yes, sir.

Q. So you used all the books and records of the Acme Meat Company?

A. That is correct, your Honor.

Q. (By Mr. Strong): Do you have those books and records?

A. Of the Acme Meat Company?

Q. Yes. A. No, sir.

Q. Where did you see them?

A. In the office of the Acme Meat Company.

Q. Is that where you left them?

A. That is where I left them.

(Testimony of J. Bryant Eustice.)

Q. May I have that slip of paper?

A. Do you want it taken out?

Q. Yes, please.

A. I had this for information. I don't believe this went into the actual computation. That is, I had this piece of paper from Mr. Himmelfarb for information, but I did not actually go into the computation with it.

Q. Look at that summary, and see if there isn't an item dealing with rent in connection with which you may or may not have used it? If so, we want to know.

Mr. Katz: I object to that as leading this witness. He is an intelligent witness, and he doesn't have to be led.

The Court: I don't think that question is objectionable.

Q. (By Mr. Strong): Which is the paper that you got from Mr. Himmelfarb?

The Court: Mr. Witness, you have in that folder there—I think that is Exhibit 40, is that right?

A. 41.

Q. Relating to Phillip Himmelfarb?

A. Yes.

Q. You have in that folder there all of the information that you took into consideration in making your calculations [360] in connection with this claim of underpayment of tax, do you?

A. Well, this——

Q. Except that?

A. Exhibit 6. And the income tax return itself.

(Testimony of J. Bryant Eustice.)

Q. But nothing else? That contains all the information that you took into consideration in any manner in connection with your calculations?

A. And information given to me by the Special Agents.

Q. And other information by the Special Agents? A. That is all, your Honor.

Q. Is it recorded in there?

A. In the work papers?

Q. Yes. A. No, your Honor.

Q. It is not?

A. Not in my work papers.

Q. That was oral information?

A. That is correct.

Q. (By Mr. Strong): Do you have that paper which you say you used?

A. Do you mean in connection with the rents?

Q. Yes.

A. I wish to change that to the extent that I didn't use that in my computations there.

Q. Only those two documents, the books and records of [361] the Acme Meat Company, and the fiscal year return, which is Government's Exhibit No. 6, and the return of the defendant for the current year?

Mr. Katz: I object to that as not being a correct statement of the testimony of this witness just related pursuant to a question your Honor put to him.

Mr. Strong: I am not stating. I am asking.

(Testimony of J. Bryant Eustice.)

The Court: It is not a fair assumption of all the facts in evidence. However, I think we know what information he took into consideration. Now, if I understand your testimony correctly, you took into consideration Phillip Himmelfarb's return, the partnership return, and the data and information gathered together in that file, and all statements made to you by other agents?

The Witness: I believe that sums it up completely, your Honor.

Mr. Katz: I don't understand.

The Court: He said he believed that sums it up completely. And we will take the morning recess. Remember the admonition.

(Short recess.) [362]

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Robnett: Yes.

The Court: Proceed.

The Witness: Your Honor, could I have the last question read?

The Court: The other reporter has it.

The Witness: Could I make the point that I wanted to bring out?

The Court: Do you wish to add something to your answer?

The Witness: Yes.

The Court: All right.

(Testimony of J. Bryant Eustice.)

The Witness: And that is the fact that these work papers are—I think you asked me the question if they were used——

Mr. Katz: Sorry. I cannot hear the witness.

The Witness: His Honor asked me if I used the working papers, Exhibit 41.

The Court: I asked you if you had recourse to it or to the information in them.

The Witness: I wanted to be plain that I did not use any of these work papers in the determination of the defendant's income tax.

The Court: You mean you didn't use any of the information contained therein in making your calculations?

The Witness: That is correct.

The Court: You did have recourse to the information contained therein, however, in your investigation?

The Witness: I investigated these accounts to see whether they were to be of any value to me in determining his income tax.

The Court: All right.

The Witness: After I had done that——

The Court: You disregarded the information?

The Witness: I disregarded the information.

The Court: Very well.

Q. (By Mr. Strong): That is the working papers, Government's Exhibit 41?

A. Yes, sir.

Q. Just one more question. I think there was reference made to the working papers constituting

(Testimony of J. Bryant Eustice.)

a transcript of the bank accounts that were referred to. Are they a transcript?

A. That is for this bank account at First and Chicago?

Q. Yes.

A. This was taken some time ago, it was copied; the part that I copied indicates that it was taken from the ledger accounts of the Bank of America at First and Chicago.

Q. Was that a complete transcript of the accounts? [364]

The Court: He stated that it was not, the part that he copied was not, and the others had been supplied.

When you copied that you intended to make an accurate copy, did you?

The Witness: That is correct, your Honor. I am testifying to the part that I copied.

The Court: You intended to make an accurate and true copy of what those records reflected?

The Witness: Yes, your Honor. As far as I know, my copy is an accurate and true copy.

Q. (By Mr. Strong): Do you know whether Mr. Phoebus made a transcript?

Mr. Katz: That is calling for a conclusion of this witness.

The Court: Objection sustained.

Mr. Strong: Your Honor, the word "transcript" was used, and I want to clarify it.

The Court: The witness used it. I think it is clarified.

(Testimony of J. Bryant Eustice.)

Mr. Strong: No further questions on the voir dire.

The Court: Proceed with your examination.

Do you have any voir dire questions, Mr. Robnett?

Mr. Robnett: No, I didn't understand that this was against our defendant, this particular testimony.

The Court: Yes, this witness' testimony yesterday afternoon all related to your *defendant Robnett* exactly, your Honor, but not this particular testimony as to Mr. Himmelfarb.

The Court: All right.

Mr. Strong: Except that they are both named in the same count, your Honor.

Mr. Robnett: I object to any testimony from the witness regarding Mr. Himmelfarb and Mr. Himmelfarb's report or return of income tax or anything in connection with it, on the ground that it is hearsay as to the defendant Sam Ormont, and incompetent, irrelevant and immaterial, no connection having been shown between them.

Mr. Strong: That will be tied up, as we have been going along previously.

The Court: Very well. I will reserve ruling on the objection.

Mr. Katz: If the Court please, may I at this time object to the use of the working papers and the use of the summary made therefrom and that both the working papers and the summary be not in any way referred to by Mr. Eustice in any testimony that he may be called upon to give.

(Testimony of J. Bryant Eustice.)

The Court: He has already referred to them in the testimony.

Mr. Katz: If I recall correctly, your Honor——

The Court: Although I do not think he did with relation to Phillip Himmelfarb. [366]

Mr. Katz: It was because of the intended use of those records, if the Court please, that this examination was made.

The Court: Yes. I understand. All right.

Mr. Katz: I now predicate my objection upon the basis of such examination.

The Court: Your objection is good, that is, to the use of the working papers, which will remain, however, marked for identification.

Mr. Strong: I would like the record to show that the witness has had the working papers taken away from him and that they are given back to the Clerk. Now I will examine him without the working papers.

Mr. Katz: Will that also include the summary, if the Court please?

Mr. Strong: Not the summary.

The Court: No. He testified that he disregarded all of the information in his working papers in making the summary, and that portion of the objection will be overruled. That goes, however, to the weight of his testimony and not to its admissibility.

The Witness: Your Honor, in looking at the adjustment here I believe I overlooked the fact that Phillip Himmelfarb was in operation for himself in the first part of 1944 before he joined Sam Or-

(Testimony of J. Bryant Eustice.)

mont and he had income from that business operation. I examined those books and records of the Phillip's Meat Company but I did not make any change in his income as [367] a result of that examination.

The Court: Did you examine his bank account in that connection of the Phillip's Meat Company?

The Witness: Yes, your Honor.

The Court: All right. Proceed.

Q. (By Mr. Strong): Did you rely in making your computations of the income for Phillip Himmelfarb for the year 1944, did you rely upon any of the figures which you obtained from the books of the Phillip's Meat Company as you just testified?

A. You mean in the determination of the additional income?

Q. Yes. A. No, I did not.

Q. Did you rely upon the bank account which his Honor just asked you about?

A. No, I didn't. There was no change on that income from the Phillip's Meat Company.

Q. Will you please look at the summary that you have with reference to Phillip Himmelfarb for the year 1944——

Mr. Robnett: We understand that this testimony is going in subject to my objection that I have heretofore made?

The Court: Yes, that is correct, without restating it.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Strong): Would you look at the income tax return of Phillip [368] Himmelfarb for the calendar year 1944, which is Government's Exhibit 3, I believe, in evidence? A. No. 4.

Q. Exhibit 4—and also look at the income tax return of Mrs. Phillip Himmelfarb, which is Exhibit 5 in evidence. Will you state what the return of Phillip Himmelfarb shows as having been reported by Phillip Himmelfarb as his salary for the calendar year 1944? A. \$4500.

Q. Do you disagree with that figure?

A. Yes, I did.

Q. What did you claim, if anything, as the correct figure for salary received by Phillip Himmelfarb during 1944?

Mr. Katz: Objected to, if the Court please, as no foundation laid, incompetent, irrelevant and immaterial, the records would be the best evidence as to what the facts are with respect to that matter. It is incompetent, irrelevant and immaterial, not bearing on any issue in this case.

The Court: Yes. I think you are going to have to produce some records along here some place, Mr. District Attorney.

Mr. Strong: Well, your Honor, he has testified to the records which he used.

The Court: I know he did.

Mr. Strong: I have produced the income tax returns. [369]

The Court: Yes.

(Testimony of J. Bryant Eustice.)

Mr. Strong: And the only other records are the books and records of the Acme Meat Company.

The Court: Well, actually the jury has to make this determination, whether he is right or not, and they are entitled to the same information that he had.

Mr. Strong: But he only relied on those documents.

The Court: He relied on the books and records.

Mr. Strong: Of the Acme Meat Company.

The Court: That is correct.

Q. (By Mr. Strong): Do you have the books and records of the Acme Meat Company?

A. No, I have not.

The Court: You did have access to them, however, in making your calculations?

The Witness: Yes, sir.

Q. (By Mr. Strong): Where did you last leave them or see them?

Mr. Katz: That has been asked and answered, and has no bearing on any issue, if the Court please.

Mr. Strong: We don't have those books and records, your Honor, but we have some computations which the witness made from them.

Mr. Katz: Neither do we, your Honor. [370]

The Court: I cannot help it. It is still hearsay. Unless you produce the books and records here from which they are made so that the parties themselves may examine them and the jury, if they desire, may look at them.

(Testimony of J. Bryant Eustice.)

Mr. Strong: They are not available to us, your Honor. I don't want to state the reasons in court.

The Court: There are processes of the United States Government to use and you have the processes of this court.

Mr. Strong: Does your Honor suggest that I could use that process in a criminal case as to these books without going further into the books?

The Court: I am not suggesting anything. I am just reminding you that the law is here. Here is the body of the law which you can avail yourself of. I am not saying in advance whether you can correctly or properly do so, but I am saying that you cannot produce a witness on the stand who has gathered information from books which are not here and which the parties do not have available to examine and which the jury can see. Otherwise it is the rankest kind of hearsay.

Mr. Strong: I know it is a little early, but may I ask that your Honor adjourn at this time so that I can attempt to secure these books and records?

The Court: Do you have other witnesses here?

Mr. Strong: I have other witnesses but their testimony is based upon the testimony of this witness. [371]

The Court: I am not disposed at all to grant your request. You stated last week, and we got a late start——

Mr. Strong: I will withdraw the request. May I withdraw the witness for the time being?

(Testimony of J. Bryant Eustice.)

The Court: Have you concluded his testimony in so far as the defendant Ormont is concerned?

Mr. Strong: Yes, I think I have.

The Court: All right. Then Mr. Robnett can cross examine on Sam Ormont.

And, Mr. District Attorney, your contention is not that he was an owner of the business but that it was a salary that he received. Therefore the inference certainly exists that they were not his books that were examined.

Mr. Strong: I don't know that I made that contention, your Honor. We contend that he was part owner.

The Court: That is what your statement says right here, your summary.

Mr. Strong: That is what the income tax return shows.

The Court: No, these are the assessments. The increase is almost entirely from the adjustments by adding to his salary. [372]

Cross-Examination

By Mr. Robnett:

Q. Mr. Eustice, you started your said investigation of the income of Mr. Ormont for the years 1942, 1943 and 1944 on or about what date?

Mr. Katz: May we have the same understanding with reference to the cross-examination of this witness as we have with respect to the direct examination, that it is not binding upon the defendant Himmelfarb?

(Testimony of J. Bryant Eustice.)

The Court: You mean the understanding is that you will be deemed to have made an objection to each question?

Mr. Katz: Yes, and that your Honor has made the same ruling you have heretofore made.

The Court: If you make objection to that question——

Mr. Katz: I do so.

The Court: I will sustain the objection. And the same objection will be deemed to have been made, and the same ruling, until otherwise noted.

Mr. Katz: Thank you.

Q. (By Mr. Robnett): Do you understand the question?

A. Yes, sir. On November 8, 1945.

Q. Were you placed in full charge of that investigation, or were you only a helper?

A. I was in full charge of the determination of the [373] taxpayer's correct income.

Q. Were you in full charge of the work that was being done, or was to be done, in connection with the returns of Mr. Ormont for his income taxes for the years 1942, 1943 and 1944?

A. Yes, sir, I was in full charge of the audit.

Q. Who, if anyone, assisted you?

A. Well, for the most of the period I did not have any assistance in the audit. Mr. Phoebus was the Special Agent on the case. He functions differently on the case than I do in making the audit. My responsibility is primarily to make the audit and determine the taxpayer's correct income.

(Testimony of J. Bryant Eustice.)

Q. What were Mr. Phoebus' duties?

A. I believe he can best testify to that. I am not thoroughly familiar with the duties of a special agent of the Intelligence Unit.

Q. What, if anything, did he do in aiding you in your work?

A. At times, when we were making transcripts, I have asked him if he would copy some of the figures for me as a matter of saving time.

Q. Anything else?

A. I believe at times he may have copied some of the information from the records. I am not sure without reference to my work papers.

Q. When you refer to your work papers, that is Exhibit [374] 40, is it not? A. Yes, sir.

Q. That is what you used yesterday, and was part of that prepared by Mr. Phoebus?

A. I can only tell that by looking at it.

Q. Have you that before you?

A. No, I have not.

The Court: 40, Mr. Clerk.

Q. (By Mr. Robnett): Will you kindly examine Exhibit 40, and if you find any portion of that was prepared by Mr. Phoebus, will you so state?

A. Your request is for me to go through all of it?

Q. Yes.

A. The information, as I testified yesterday, as to the inventory of the U.S. Government bonds which the taxpayer had in his possession was given to me by Mr. Phoebus.

(Testimony of J. Bryant Eustice.)

Q. Before you pass that, did you ever check that information with any source? A. No.

Q. Other than just taking it as it was written by Mr. Phoebus? A. That is correct.

Q. Proceed.

A. Transcript of the capital account of Sam Ormont from [375] January 5, 1931 to March 31, 1943 was copied by Mr. Phoebus.

Mr. Strong: Your Honor, in order to shorten time, can we have the witness mark the pages with a pencil, or something, so we don't have to look it up later?

The Court: All right.

The Witness: Can I affix a paper? I can put them in there.

The Court: Here are slips of paper made specially for that purpose.

The Witness: Did I give the dates?

Q. (By Mr. Robnett): On the capital account you gave January 5, 1931 to March 31, 1943.

A. Sam Ormont's withdrawals from March 6, 1937 to March 31, 1943 copied by Mr. Phoebus. There is another capital account of Mr. Salter, which was copied by Mr. Phoebus, from January 5, 1931 to March 31, 1943. And withdrawals, Frank Salter, from March 6, 1937 to March 31, 1943; copy of trial balances for the years ending December 31, 1941, December 31, 1942, March 31, 1943. Commercial account of Sam Ormont, Security First National Bank, March 15, 1932 to December 8, 1934.

Q. 1934?

(Testimony of J. Bryant Eustice.)

A. 1934. The same account from January 8, 1940 to April 28, 1943. Transcript of savings account No. 747, Sam Ormont, Bank of America, Brooklyn and Soto, August 3, 1933 [376] to August 26, 1944. Sam Ormont's commercial account, First National Bank of Vernon, December 31, 1930 to April 18, 1931. That is all. [377]

Q. In making your computations of the income tax which you claim was due from Mr. Ormont for the years 1942, 1943 and 1944, did you make use of any of the documents or transcripts you have identified in your work sheet as having been made by Mr. Phoebus?

A. Yes, I used these transcripts I have here.

Q. Before using them did you check them or verify them with the originals from which they were supposed to have been taken?

A. You mean—I was present at the time that they were taken off there at the office. I didn't sit down and check each item. That was the purpose of having Mr. Phoebus transcribe them was to save time so that I could check the accuracy of the figures after in balancing the bank accounts.

Q. What did you check the accuracy with?

A. The beginning balance, plus the deposits as shown on these transcripts, less the checks that were written against the account. I also saw every one of these checks and I entered them personally one by one in this commercial account. I checked the deposits on this account in detail.

(Testimony of J. Bryant Eustice.)

Q. As against this transcript, you mean?

A. Yes, sir.

Q. And as to the other information—what account was that on, what Bank?

A. The commercial account of Sam Ormont at the Security-First National Bank.

The Court: Under the name of the Acme Meat Company?

The Witness: His personal bank account; Sam Ormont.

Q. (By Mr. Robnett): As to the other bank accounts you have testified to, is that in that work sheet, and which you say were copied by Mr. Phoebebus, did you check any of those with the originals?

A. The same thing applies to these: I checked the withdrawals, that is, most of the withdrawals, the large withdrawals, all of the deposits and reconciled the bank accounts with the figures that were taken in the transcript.

Q. On all the other accounts?

A. On the accounts that were used in 1942, 1943 and 1944, and these other accounts that went back into—I would say as far back as we took them I reconciled the bank accounts.

Q. When you say you reconciled the bank accounts, what do you mean?

A. Well, took the beginning balance, added the deposits as shown on the transcript, deducted the checks that were shown on the transcript and reconciled that; that is, when you—I will start over and explain it over again.

(Testimony of J. Bryant Eustice.)

I start out with the beginning balance, add the deposits, deduct the checks, and that is the ending balance as shown on the bank statement. If there is any error that had been made, it will show up then. [379]

Q. Just a moment. You checked those, you say, against the original bank books?

A. Against the balances shown on the bank statement.

The Court: The totals? In other words, you checked your totals against their totals?

The Witness: Yes. In other words, in taking these transcripts from time to time we put in a balance, and also the beginning and ending balance on the transcript so that we can make that reconciliation.

Q. (By Mr. Robnett): And those balances that you put in in this transcript or that were in there were those balances likewise on the bank books, the original records?

A. They were on the bank records; that is where they came from, yes.

Q. I mean the balances themselves, were there as well as the items?

A. They are there every day on the ledger cards.

Q. I see. All right.

A. We have copies, I believe, of all those ledger cards here and that can be verified very shortly if necessary.

Q. Did you in your calculations of the income of Sam Ormont for the years 1942, 1943 and 1944 use

(Testimony of J. Bryant Eustice.)

the capital account of Sam Ormont that was copied in this work sheet that you have testified was copied by Mr. Phoebus? [380]

A. Yes, sir; I did.

Q. You used that?

The Court: Capital account? Where did that come from? From his books?

Mr. Robnett: I will ask the witness.

The Court: What do you mean by capital account?

The Witness: That shows the amount of capital he has invested in the business.

The Court: Where did you get that?

The Witness: From the books and records.

The Court: The books of the business?

The Witness: Yes, the books of the business.

Q. (By Mr. Robnett): Did you, before using that, check it with the books, check the copy that you have there with that work sheet?

A. Yes, I did. I had to trace a great many of those items. I had to check this transcript with the books and make entries on it. I did the detail on that. After Mr. Phoebus just copied it, that was all.

Q. What kind of entries did you have to make on it?

A. Where the money came from that was invested in this capital account, when the money was drawn out, what the money was used for.

Q. Now referring to your investigation, will you state every document, book or paper that you used in arriving at your [381] conclusions that you have given in evidence here.

(Testimony of J. Bryant Eustice.)

The Court: You mean to say that he had recourse to for information?

Mr. Robnett: Yes, your Honor.

The Court: Apparently the witness distinguishes between that and use.

Mr. Robnett: All right.

Q. Every one that you had recourse to.

A. I had recourse to all of these work papers, I would say.

Q. All of the ones of that Exhibit 40?

A. Yes, that is, in the examination, not—I didn't use all these figures in the computation of the taxpayer's income only from January 1, 1942 to December 31, 1944, but I used this information to verify the accuracy of the determination of his income and in preparing financial statements of the taxpayer, particularly at the beginning of 1942 so that I would know what sources of income the taxpayer had in his possession at the beginning of 1942.

Q. Now were there any other books or records that you used than the records that you have in Exhibit 40?

A. I do not understand the question.

Q. That you had access to in making up your report, other than what is shown in Exhibit 40.

Mr. Strong: Your Honor, that is confusing because there [382] are two reports here.

The Court: It will be less confusing at 2:00 o'clock, to which time we are adjourned.

Remember the admonition.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [383]

(Testimony of J. Bryant Eustice.)

Q. Did you make an examination of the deposits in the Acme Meat Company, or the payments to the Acme Meat Company by Mr. Ormont?

A. Do I understand the question, deposits to the Acme Meat Company?

Q. Payments to them, or deposits in their account by him.

A. Some of the deposits.

Q. Some of them only?

A. Yes, sir.

Q. You didn't examine all deposits then?

A. Not all deposits, no.

Q. Do you have a list of the particular deposits that you did examine?

A. Yes, sir, I have.

Q. In Exhibit 40?

A. Yes, they are in Exhibit 40.

Q. All that you did examine are in Exhibit 40?

A. I believe that is correct.

Q. Will you turn to that portion of Exhibit 40, where they are set forth? Have you them before you? [389]

A. Yes, sir, I have.

Q. As I understand from you, these do not represent all the deposits that may have been made to the Acme Meat Company by Sam Ormont, or all the payments made by Sam Ormont to the Acme Meat Company, but they do represent all that you copied, is that correct?

A. Yes, that's all that I copied.

Q. May I see them, please? [390]

Q. Just this one page that you have open, or is there more?

A. Well, these are these pages. These are just as I took them off at the time I made a more complete summary.

(Testimony of J. Bryant Eustice.)

Q. You say these pages here. There are four of them. The one preceding them is a yellow page and the one following them is a yellow page, is that correct? A. That is correct.

Q. They are not numbered, though, are they?

A. No, sir

Q. Have you totaled these items on these four pages which represent payments by Mr. Ormont to the Acme Meat Company?

A. These are not necessarily all payments of Sam Ormont to the Acme Meat Company. These are deposits that were made to the bank account of the Acme Meat Company in which there were certain items that represented credits, or credits were made to Sam Ormont's capital account in the Acme Meat Company.

Q. Well, certain items you did credit to him as capital account?

A. They were credited on the books and records of the Acme Meat Company to his capital account. Those were the items that I was interested in.

Q. What I am asking you, Mr. Eustice, is this, did you at any time make a statement, itemized statement, of the various [391] amounts that were paid into the Acme Meat Company by Mr. Ormont, that is, whether they were paid in as cash or whether they were deposited to the Acme Meat Company's account by Mr. Ormont individually.

A. Yes, I have a summary of that in each year.

Q. Did you make a summary of every item of that nature?

(Testimony of J. Bryant Eustice.)

A. That was money that was paid in by Mr. Ormont credited to his capital account or credited to a loans payable account.

Q. I don't care where they were credited, any and all moneys that he deposited for the account of the Acme Meat Company or paid to the Acme Meat Company. A. Yes, sir.

Q. Have you the itemization of those amounts in Exhibit A? A. In which exhibit?

Q. Pardon me, in Exhibit 40, the one you have before you, your work sheet.

A. Well, I show it in my analysis of the accounts here, which is the first part here.

Q. Does that itemize those items giving the dates and amounts?

A. Those items were taken from his capital account as shown on the books and records.

Q. All right. But you have an itemization of those, [392] have you, there?

A. Yes, they will show up in the transcript I have of his capital account.

Q. Do they show up in the paper you have before you now?

A. Are you speaking of any particular year, Mr. Robnett?

Q. I want all that you took.

A. Well, referring to the year 1942 Mr. Ormont deposited additional capital to Acme Meat Company of \$3800.

Q. What date?

A. I will have to refer to his bank account now.

(Testimony of J. Bryant Eustice.)

Q. All right. Whose bank account are you referring to?

A. Sam Ormont's. It was charged to his personal bank account at the Security-First National Bank on March 12, 1942.

Q. What date did you give in the other that you just stated, or did you give any date? You didn't, did you?

A. No, because I have summarized these items.

Q. Did the books show that that was the date that he made that contribution to the capital of the Acme Meat Company in the sum you testified to, \$3800, I believe, or are you merely saying that that is the date that there was a check drawn against his personal account for that amount?

A. No, we refer to his capital account and see where it was credited to his capital account from his account.

The Court: Where did the money come from?

The Witness: From his personal bank account.

The Court: Which one?

The Witness: His commercial account at the Security-First National Bank, Huntington Park.

The Court: What date?

The Witness: March 12, 1942.

The Court: Did you check the Acme Meat Company's bank books to see if that deposit was made?

The Witness: Well, I checked his records to see if that was where the credit was for that \$3800. I also had the check, I examined the check to see that the check was deposited to his personal bank

(Testimony of J. Bryant Eustice.)

account. Then the only part I was interested in was where it was credited on the books and records of the Acme Meat Company.

The Court: That is March 12, 1942?

The Witness: Yes, sir.

The Court: The bank ledger shows a deposit of \$7600 on that date.

The Witness: That is quite probable.

Mr. Strong: I submit you have the wrong account.

The Court: Acme Meat Company.

Mr. Strong: Which bank?

The Witness: That is quite probable. This \$3800 could be included in other deposits or other moneys that he deposited. [394]

The Court: All right.

Q. (By Mr. Robnett): Did you check the deposit slips of that day of the Acme Meat Company for that date?

A. No. I really had no purpose to do that.

Q. I say, did you? I am not asking you your purpose. A. No, I did not.

Q. You did not? A. No.

Q. You merely took their books, you didn't check the bank account at all?

A. That is correct. [395]

Q. Did you check that \$7600 item to find out of what it was composed, and where it came from, that his Honor just called to your attention?

A. The rest of the deposit? No, I had no interest in the rest of the deposit to check where it came from.

(Testimony of J. Bryant Eustice.)

Q. You had no interest whatever in the rest of it?

A. As long as it was properly recorded on his books and records. I mean I did not make and detailed audit of that deposit slip.

Q. Did you, in calculating the income of Sam Ormont for the year 1942, use, or have access to information pertaining to that \$7600?

A. I had access to that, yes, to all the information regarding that.

Q. You say you did not use any portion of it only the \$3800 in making your calculation?

A. Yes, and my interest there was to check the flow of the money out of Mr. Ormont's personal bank account, and also I was checking the flow of money from the business bank account of Mr. Ormont's personal bank accounts.

Q. Were there any other items that you found whereby Mr. Ormont had paid to the Acme Meat Company, any money at any time?

A. Yes, there were some of those I have taken into income. [396]

Q. I beg your pardon.

A. Some of those I have taken into income.

Q. I know, that is just what you have done. I want to find out about these items, where are they, and what are they?

A. Do you have any particular year?

Q. I want from the beginning to the end of the Acme Meat Company.

A. Well, the first one of those deposits was on May 21, 1943.

(Testimony of J. Bryant Eustice.)

Q. What was that item? What was the amount?

A. The amount of the deposit was \$1195.93.

Q. That was deposited to the Acme Meat Company, and paid by Mr. Ormont to the Acme Meat Company, is that correct?

The Court: When you say that was deposited, do you mean to say, Mr. Witness—do you mean to say that the books of the Acme Meat Company show that Sam Ormont paid that much money into the business, or do you mean to say that the bank records show the deposit of that sum—which?

The Witness: The books and records of the Acme Meat Company show a deposit on May 21, 1943 of \$1195.93.

The Court: You don't know what the bank record showed?

The Witness: I examined that deposit, yes.

The Court: Did it show that deposit?

The Witness: Yes.

Q. (By Mr. Robnett): You say this first one, that was in 1943. Didn't [397] you examine the Acme Meat Company's books of account from the time it became the Acme Meat Company?

A. I examined certain accounts in the books and records of the Acme Meat Company.

Q. What was the earliest item in those books that you examined? A. Well, the——

Q. Let me have the year first.

A. I would say I examined the capital account from 1931.

(Testimony of J. Bryant Eustice.)

Q. Was there not a set of books that related back to 1928? A. I didn't see those.

Q. 1931, starting there, were the only books you saw, were they?

A. 1931. I believe that was when the partnership of the Acme Meat Company was first established.

Mr. Robnett: I move to strike that out as the opinion of the witness.

The Court: It may be stricken out.

Mr. Robnett: I am just asking you as to the books, when they began, the ones that you examined.

A. I don't recall any books prior to 1931.

The Court: Those are the ones you examined, that began in 1931?

The Witness: Yes, your Honor. [398]

Q. (By Mr. Robnett): Did you take off from those books, starting with 1931, each and every item that was shown thereon as a contribution by Mr. Ormont to the Acme Meat Company, or a payment to it? A. That was shown in the——

Q. I say, did you take off any itemization of those?

A. Yes, as shown in the capital account.

Q. Have you a copy of that before you?

A. I have it here, yes.

Q. Does that show each and every contribution that he made to the Acme Meat Company?

A. There was also a loan account.

The Court: Does that first one show all of the contributions, or are you just looking at the one

(Testimony of J. Bryant Eustice.)

that does show all the contributions, except the loan account, or between that and the loan account does it show the contributions?

The Witness: Yes.

Q. (By Mr. Robnett): Have you the contribution to capital set up separately in Exhibit 40 for the entire period from 1931?

The Court: Do you mean whether they are designated as contributions of capital or loans? [399]

The Witness: Apparently there is some records of loans of capital account, or he himself has arbitrarily established two separate designations.

Mr. Robnett: I want him to give them, and have them segregated. I want to know which are loans, and which are capital accounts.

The Court: What you want to know is all the money Sam Ormont put into the business, whether capital or loans?

Mr. Robnett: Yes, but I would like them earmarked, as to whichever they may be.

The Court: All right. Do you mean to let this witness designate them?

Mr. Robnett: No.

The Court: Or how? He says they were on the books.

Mr. Robnett: How he says they were on the books.

A. Well, I have before me the transcript of Sam Ormont capital account. It shows his original investment, and then other contributions, credits to that account, credits of profits to the account as well as other amounts of capital.

(Testimony of J. Bryant Eustice.)

Q. That starts with the date of January 5, 1931, doesn't it? A. Yes, sir.

Q. How many pages is it, more than just one page?

A. It goes on to about two and a half pages.

Q. And that ends with the item dated 12/31/44, is that [400] correct? A. Yes, sir.

Q. The items below that are not any contributions to capital by him? A. These are 1945.

Q. I understand, but they are not contributions to capital?

A. They are not contributions to capital. [401]

Q. Now have you, without us reading all of those items or going into each item, the aggregate value of all those contributions to capital that you have just designated started with January 5, 1931 down to and ending with 12/31/44? A. No.

Q. You have no total of that at all?

A. No. I show them as whether they have gone into his personal bank accounts or whether they came out of his personal bank accounts in each of these years, but I didn't take a total of the contributions.

Q. Well, let's take, for instance, the year 1942. Will you state those items—there is about 12 or 15, I would say—I want now the dates and the amounts of contributions to capital during 1942 by Sam Ormont to the Acme Meat Company.

A. Well, in 1942 this item I gave you of March 29, 1942, to \$3800, which was transferred——

(Testimony of J. Bryant Eustice.)

Q. These are just contributions to the capital of the Acme Meat Company, aren't they?

A. Yes.

Q. From Sam Ormont?

A. From Sam Ormont.

Q. And that is all that I want. Just give the dates and the amounts.

A. You don't care where it is from?

Q. No. [402]

A. The other contributions for that year as credited in that year are the profits from the business.

Q. How much?

The Court: Do you want him to give the first item first?

Mr. Robnett: Oh yes, the first item.

The Court: The contributions before the profits?

Mr. Robnett: Pardon me. If I understand the witness correctly, he is giving the items of contribution whether they were direct payments by check or whether they were contributions by leaving profits in.

Q. Is that correct? A. Yes, sir.

Mr. Robnett: That is the way I understood his testimony, your Honor.

The Court: Is that your question?

Mr. Robnett: My question is, I want every contribution, no matter whether it was by cash or check or by leaving profits in.

The Witness: Well, there was \$3800 that we had discussed, which was a contribution; \$10 which

(Testimony of J. Bryant Eustice.)

was a credit or over-deposit; \$5200 which was credited as salary.

The Court: And not paid? That he didn't take out of the business?

The Witness: Yes, he had withdrawn that. It shows that [403] that is transferred from his drawing account.

The Court: If he took it out it wouldn't be a contribution then.

Mr. Robnett: Certainly not.

The Court: Well, I don't know.

Mr. Robnett: I don't know either, but I am asking the witness to give us the contributions.

The Witness: I am giving you the credits to his capital account.

The Court: And \$5200 was taken out of the business, the \$5200 was withdrawn by him as salary, isn't that right?

The Witness: Yes.

The Court: Or was it left in there?

The Witness: We might express it better this way, to say that there was profits during the year, that is, Sam Ormont's profits, of \$10,208.18, which was credited to his capital account. He had made withdrawals of \$5200, which was charged against that.

The Court: So that there was \$4800 or thereabouts that he left in as profits for that year?

The Witness: Well, he left \$5008.18 as profits and in addition deposited \$3800 from his personal bank account.

(Testimony of J. Bryant Eustice.)

The Court: You said a moment ago that his profits from the business were \$10,000 and some-odd.

The Witness: Yes. [404]

The Court: And he drew \$5200 of that out in salary?

The Witness: Yes, sir.

The Court: \$5200 from \$10,000 is \$4800, isn't it?

The Witness: \$10,200.

The Court: Oh, it was \$10,200?

The Witness: \$10,208.18.

The Court: So that it was \$5000, or whatever the figure was, that he left in the business to his capital account?

The Witness: That is correct.

The Court: And put \$3800 out of some other source, his private account?

The Witness: That is correct.

The Court: And \$10?

The Witness: Which was an adjustment.

The Court: Very well. That is all for 1942, is that right?

Q. (By Mr. Robnett): Were those the only contributions to capital by him in 1942?

A. Yes, that is correct.

Q. Now in 1943, will you give us all contributions by Mr. Ormont to capital of the Acme Meat Company?

The Court: By the way, did he start out the year 1942 with any credit on his capital account?

The Witness: He had a credit of \$9743.25

(Testimony of J. Bryant Eustice.)

The Court: Before adding these figures you have just given us?

The Witness: Yes, sir.

In 1943 on March 2 he made a \$2500 contribution to his bank account.

Q. (By Mr. Robnett): You mean to the Acme Meat Company account?

A. Acme Meat Company capital account.

Q. All right.

A. There was a credit, it was called earned salaries, of \$1300 to his capital account, and then he withdrew all of his capital—well, at that time he closed the bank account, the business bank account, at the Security-First National Bank and——

The Court: That was 1943?

The Witness: March 31, 1943.

The Court: That is about the time of the dissolution of the partnership with Salter?

The Witness: Yes, sir. And he opened a bank account with the Citizens National Bank there and I believe that was \$2400, and with the other assets he credited the capital account with \$3095.45 That becomes his opening capital account as of April 16, 1943.

On May 18, 1943 he deposited \$600 to his capital account. [406]

On May 21, 1943, \$200.

On May 25, 1943, \$2500.

On October 9, 1943, \$1900.

On December 31, 1943, the 1943 profit, \$11,525.22 was credited to his capital account.

(Testimony of J. Bryant Eustice.)

During this same period of time he had drawn \$6014.24 net which has been charged to his personal account.

That is made up of one item for \$6000, another item for \$14.24.

The personal account was closed into the capital account, charging the capital account for \$6014.24, leaving a balance of \$13,806.43.

Q. (By Mr. Robnett): Is that the total for '43?

A. That ends '43.

Q. I want to ask you about 1942. In your calculations of what you claim should have been and was his income for '42, I will ask you to examine any records you have there—I guess you have it before you in Exhibit 40, have you?

A. I have Exhibit 40.

Q. You have what you claim his income was in '42?

A. Yes.

Q. You have that before you, have you?

A. Yes, sir

Q. As I understand from you, you criticized his 1942 [407] return, and that is Exhibit—what exhibit is it? Do you have it before you? Is it No. 3?

The Court: I believe it is No. 1.

The Witness: I am looking at what is a continuation of this work paper here. In other words, it is a summary of that. It hasn't been identified as an exhibit.

The Court: I think No. 1 is Sam Ormont's 1942 return.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: I believe so. Yes, this is the 1942 individual income return of Sam Ormont. It is Exhibit No. 1 in this case, or a photostat of it.

Q. Mr. Eustice, I will ask you to examine that and, taking the first item, that I understood from you yesterday that you criticized, and that was item No. 1, salaries, and other compensation for personal services, \$5200.

A. No criticism except that it was technically reported wrong. I had to change it as in my report as income from the business. The only item that it affected was in the computation of the tax. If it was left as salary he would be entitled to an earned income credit on that amount in excess of what he would otherwise be entitled to if it was reported as income from the partnership. And that was the reason for changing that item from item 1 and including it in item 10, not increasing the taxpayer's income any.

Q. So you say that he reported the \$5200 as an income but he reported it, according to your theory, incorrectly [408] because he said it was a salary and it should have gone under your opinion as income from the partnership.

A. That is correct.

Q. And by so doing you then took from him the credit he had asked for in his return and had credited of earned income credit of \$620.16, did you?

A. That is correct, and substituted \$300, I believe.

(Testimony of J. Bryant Eustice.)

Q. I beg your pardon?

A. And substituted \$300 instead of the figure that you mentioned.

The Court: Why \$300? If he wasn't entitled to any, he wasn't entitled to any.

The Witness: All income up to \$3000 was considered as earned income regardless of the source, and he had income in excess of \$3000 and therefore was entitled to 10 per cent of \$3000 of his income as earned income credit.

Q. (By Mr. Robnett): Therefore you took away from him \$320.16 of his credit that he had claimed on his income?

A. That he wasn't entitled to.

Q. That was resetting it the way you see it?

A. By the income tax law.

Mr. Robnett: I move to strike that out, if the Court please.

The Court: It may be stricken. The Court has to determine what the law is. [409]

The Witness: I am sorry, your Honor.

Q. (By Mr. Robnett): Mr. Eustice, have you before you, or with you, your calculations or recalculations, however you did it, of the 1942 income of Sam Ormont showing exactly how you calculated it; what income you based it upon; what credits you gave, or payments or deductions, or otherwise, and how you arrived at your final figure that you say should have been his income tax?

A. Do I have that before me?

Q. Do you have that all calculated out?

A. Yes, sir, I have that.

(Testimony of J. Bryant Eustice.)

Q. Let me see it, please.

The Court: When you shifted this \$5200 from salary over to partnership income, you increased his taxable income by the disallowance of \$320?

A. That is correct, your Honor, yes. Here are my adjustments: Dividends, interest, additional amount. Here is my estimation of those adjustments.

Mr. Strong: I can't hear a word. I don't know whether the jury can hear him or not.

A. I was explaining to him, here are my adjustments in the account, specifying the different items, and my explanation of this adjustment.

The Court: From your remark that you did not know [410] whether the jury could hear him or not, I understand from the jury that due to the lectern some of the jurors cannot see Mr Himmel-farb and his counsel.

Mr. Katz: I pop up and down enough I thought they could.

The Court: I don't know how you can arrange that unless you slide around the table.

Mr. Katz: I can move another chair back here.

Mr. Strong: Maybe we can move the lectern back a little.

The Court: You have moved the table around a little, and the lectern back, and put a chair there. Now, are there any jurors who cannot see the defendants? The jurors over at the end; can you see them? All right. I don't know that it is important, but if the jury wants to see them, they are entitled to.

(Testimony of J. Bryant Eustice.)

Q. (By Mr Robnett): Now, during the entire year 1942, as the books reflect, the Acme Meat Company, there was a co-partnership, was there not, between Sam Ormont and Frank Salter?

A. Yes, sir.

Q. That is correct, isn't it?

A. That is correct.

Q. The entire year of 1942. Let me ask you when you took the sum of \$5200 that Mr. Ormont had claimed as a salary, and you disallowed it as a salary? A. I did. [411]

Q. In your calculations you disallowed it as a salary? A. That is correct.

Q. And you then put it down as part of his income from the partnership business, did you?

A. That is correct.

Q. Adding it to the sum that he had already reported from the partnership business, of \$5008.18?

A. That is correct.

Q. Now, I will ask you, Mr. Eustice, if it is not a fact that if that \$5200 was not allowable as a salary to Mr. Ormont, if it is not a fact that it was nothing but a withdrawal of part of his capital investment in the partnership?

A. In this case it had been withdrawn by him, yes. That was part of his capital.

Q. And did you distinguish it in your calculation from his capital investment?

A. Yes. At any time I used that figure I took into account the \$5200 that he had withdrawn from the business.

(Testimony of J. Bryant Eustice.)

Q. That was not income to him at all then, was it? He was just getting back the \$5200, of his capital, the way you calculated by putting it down as a withdrawal from the partnership rather than a salary, isn't that true?

A. Are you referring to the way it is reported?

Q. I am referring to the \$5200 as you calculated it. You disallowed it as a salary, didn't you? [412]

A. Yes, and considered it——

The Court: If it was salary, it was taxable income?

The Witness: If it was salary, it was taxable income but——

The Court: That is all I want to know.

Q. (By Mr. Robnett): If it was a withdrawal of his capital investment, it was not a taxable income, was it?

A. When he withdrew it from his business it was not taxable to him, no.

Q. It was not taxable then in 1942 as income, was it?

A. It was includible in his income from the business.

Q. Either it is or it not income.

The Court: Taxable income.

Q. (By Mr. Robnett): Taxable income. Now, he had a capital investment there of a great deal more than the \$5200, didn't he? A. Yes.

Q. Of money he put into that business?

A. Well, it was——

The Court: Just answer the question.

(Testimony of J. Bryant Eustice.)

The Witness: I don't understand the question.

The Court: Read the question.

(Question read by the reporter.)

A. He had more money in the business than that, yes.

Q. (By Mr. Robnett): And he simply received, according to you, he received [413] back a part of the money he had put into the business?

A. Yes, he received back a part of the money put into the business.

Q. It should not have been calculated by you as part of his income for 1942, should it?

A. Well, he withdrew—

The Court: No, answer that yes or no. Then you can explain it.

A. Yes, it should have been included in income by me.

Q. (By Mr. Robnett): What?

A. The \$5200.

Q. Do you mean to say if a man has certain money over in this pocket, and puts it over in the other pocket, that you are going to charge it as income on that money simply because he transferred it from one place to another?

A. No, sir, when he drew money out of the business it was not taxable to him as income, but it was, as he set it up, it was a part of his distributable share of the income. His method of reporting it was simply to divide the total of ten thousand some odd dollars he received, and report it in two items.

(Testimony of J. Bryant Eustice.)

But he actually did have a profit of ten thousand and whatever that amount is on the schedule—ten thousand two hundred and some odd dollars. He actually had that profit there, yes, and it was properly reportable as income. [414] In other words, on the income tax return it is Item 1 and Item 10. I put it all down under Item 10.

The Court: You disallowed it as income when you took it out of the salary, didn't you?

The Witness: Just the name.

The Court: You said it did not belong to salary, but credited it to his capital account?

The Witness: As income from the business.

The Court: Where you finally put it was back into the capital account?

The Witness: That is correct. It all goes into his capital account finally, the profit from the business.

Q. (By Mr. Robnett): I will ask you if you can quickly calculate this tax for 1942, leaving out the \$5200 that you have heretofore put in there, that you now say was capital; just leave that off, and calculate how much would have been his income if you forget the \$5200 as being income.

Q. Just leave off the \$5200, and take the figures calculation?

Q. Yes; it is very important.

A. His corrected amount of net income less \$5200?

Q. Just leave off the \$5200, and take the figures that you had figured.

(Testimony of J. Bryant Eustice.)

The Court: Taking them off or leaving them on?

Mr Robnett: I want him to figure both ways.

The Court: Which way now? In other words, take the total, and deduct the \$5200?

Mr. Robnett: Yes, that's right, take his own figures as he has them.

A. I haven't a surtax schedule. I have one in my briefcase. Can I get it?

Q. Oh, yes. A. Yes, sir.

Q. Have you figured it? All right, what have you on there as his income, gross income?

A. I beg your pardon?

Q. In that calculation what have you used as his gross income?

A. I used his net income; not his gross income.

Q. What is it?

A. The first for the corrected income, \$14,323.42, less \$5200, which Mr. Robnett asked me to deduct, left a net income of \$9223.42. [416]

Q. Now what do you figure from that and have figured on that as to what his income tax would figure on that basis, or would have figured?

A. \$1929.96.

Q. Your figures are all on this piece of paper?

A. Yes.

The Court: \$1929.26?

The Witness: Yes, sir. Of course that hasn't been checked by anybody.

Mr. Robnett: That is close enough. I offer that in evidence, if the Court please.

The Clerk: M.

(Testimony of J. Bryant Eustice.)

(The document referred to was received in evidence and marked Defendants' Exhibit M.)

Mr. Strong: May I look at that, your Honor, for a moment?

(The document referred to was passed to counsel.)

Q. (By Mr. Robnett): And, Mr Eustice, the amount of tax paid by Mr. Ormont on his 1942 income was \$2,477.91, was it not?

The Court: You have your summary there.

The Witness: Yes. The tax that he shows there is \$2,477.91.

Q. (By Mr. Robnett): Which is approximately \$500 more than the calculation [417] on exhibit—what is the exhibit?

The Clerk: M.

Q. (By Mr. Robnett): Exhibit M, is it not?

A. That is correct.

Q. Now without taking the time to figure it, but taking Exhibit 1 before you, which is his income tax report and in which he reported the \$5200 as salary, now if you take that off of that report that he filed there and you use just the other items that he used——

The Court: That he used?

Mr. Robnett: Yes, that he used on that report——

Q. I ask you if it isn't a fact that his tax would not have been one-half of the amount that he did actually pay.

A. It wouldn't be over one-half, no.

(Testimony of J. Bryant Eustice.)

Q. It wouldn't have been over one-half of the amount he actually paid, would it?

A. No, not if he deducted \$5200 from the return as it is.

Q. All right. Now let's take up the items that you claim are income or were income of Mr. Ormont in 1942. You testified yesterday about various amounts and figures. I am going to ask you about one particular figure. You mentioned yesterday that Mr. Ormont, during the year 1942, received from Sam and Ben Borne the sum of \$10,000, didn't you? [418]

A. Yes, sir.

Q. That was a repayment of a loan or a part of a repayment of a loan, was it not?

A. Yes, that is a repayment of the loan.

Q. That was not income then, was it, that was taxable?

A. That was not taxable income.

Q. You also mentioned yesterday a sum of \$200 which he received from Nolan Allen in 1942, and that was a repayment of a loan, wasn't it?

A. That is correct.

Q. That was not taxable as income?

A. That is correct.

Q. You mentioned an item of \$135—I will withdraw that.

Where did you get that item of \$200 paid back by Nolan Allen in 1942?

A. From an analysis of his bank accounts or from the bank deposits.

(Testimony of J. Bryant Eustice.)

Q. Bank deposits.

A. Examination of the bank deposit slips to his personal account.

Q. How did you trace it to know that that was from that person?

A. I talked to Mr. Allen.

Q. You talked to Mr. Allen? [419]

A. That is correct.

Q. That is all you knew about when he paid it back, isn't it, was what he told you, Mr. Allen told you?

A. The deposit slip or the check on the deposit slip indicated that it was a check drawn by Mr. Allen on his personal bank account.

Q. How could you tell that the deposit slip shows that it was a check drawn on Mr. Allen's account? Will you get the deposit slip that you got that from?

The Court: Do you have the exhibit there? He means the deposit slips. I don't know where they are.

The Witness: Bank of America.

The Court: What date?

The Witness: It is a 1942 deposit slip, Bank of America, No. 747.

The Clerk: Exhibit 37.

(The document referred to was passed to the witness.)

Q. (By Mr. Robnett): Have you the deposit slip before you from which you concluded that Mr. Allen had paid \$200 in 1942 to Mr. Ormont?

(Testimony of J. Bryant Eustice.)

A. I have the deposit slips, yes, sir, in front of me.

Q. They are in exhibit what, 37?

A. Yes, sir.

Q. All right. Will you show me which one—there are several deposit slips there—which deposit slip you mentioned [420] that that \$200 is on?

A. On February 4, 1942.

The Court: Just refer to the deposit slip.

Q. (By Mr. Robnett): It is the top deposit slip on that exhibit. A. Yes.

Q. Which item did you use?

A. These two items.

Q. The first two items?

A. The first two items.

Q. Each of those items are for \$100 apiece, aren't they? A. That is correct; yes.

Q. On that deposit slip? A. Yes.

Q. And each of the items have no identification mark excepting the 16-80 on each of them showing the clearing house number of the bank that the check is drawn on, isn't that correct?

A. That is correct.

Q. That is all that shows, isn't it?

A. That is correct.

Q. And from that you concluded and testified that Mr. Allen paid Mr. Ormont \$200 in 1942, didn't you?

A. No, sir, not just from that information.

Q. That includes what you say Mr. Allen told you? [421]

A. I also discussed this item with the taxpayer.

(Testimony of J. Bryant Eustice.)

Q. Yes. You didn't see a \$200 single item on that deposit slip, did you?

A. What I was tracing to begin with was where the two \$100 checks came from.

The Court: No, he said did you see a \$200 item on the deposit slip.

The Witness: No, there is two \$100 items.

Q. (By Mr. Robnett): In fact there are five \$100 items?

A. Yes. Two are drawn on 16-80.

Q. That is the only way that you arrived at the conclusion or the assumption that that was Allen's payment, isn't it?

A. I told you that I had also talked with Mr. Allen.

Q. I see. In the presence of Mr. Ormont?

A. In the presence of Mr. Phoebus.

Q. You never talked to Mr. Allen in the presence of Mr. Ormont, did you? A. No, sir.

Q. If then it should develop—and I may tell you that it will—that Allen's account was settled and paid in full on May 7, 1941, it would make a difference in your testimony as to that item of \$200, wouldn't it?

Mr. Strong: That is speculative, your Honor. I object. [422]

The Court: Objection overruled. The witness can answer the question.

The Witness: If it is proven otherwise, I would have no choice in the matter.

(Testimony of J. Bryant Eustice.)

The Court: No, that isn't the question, if it was proven otherwise. Counsel has asked you if it develops and that were the fact that it was '41 and not '42 it would reduce that income by \$200.

The Witness: By this computation it would, yes.

Mr. Robnett: All right.

Would you like to see this, counsel?

(Exhibiting document to counsel.)

The Court: Did Mr. Allen produce the canceled checks for you to see?

The Witness: I was looking, your Honor, for information I have here on it in my work papers.

Mr. Robnett: I would like to have this marked as an exhibit for identification.

The Clerk: N.

(The document referred to was marked Defendant's Exhibit N for identification.)

Q. (By Mr. Robnett): Mr. Eustice, I am going to show you a letter and ask you to read it to yourself, please. It is Exhibit N for identification. You have read that, have you? [423]

A. Yes, sir.

Q. Very well.

Now I want to offer this in evidence. Counsel objects on the ground that there is no foundation. I will let him state his objection.

Mr. Strong: Yes. I don't know anything about that letter.

Mr. Robnett: Then I ask the privilege at this time of withdrawing the witness and putting another witness on to identify this letter.

(Testimony of J. Bryant Eustice.)

The Court: To establish the foundation so that you can continue with your cross-examination?

Mr. Robnett: Yes.

The Court: Step down, Mr. Eustice.

(Witness temporarily excused.)

Mr. Robnett: Mr. Kosdon, will you take the stand.

BENJAMIN F. KOSDON

called as a witness by and in behalf of the defendant Ormont, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Benjamin F. Kosdon, K-o-s-d-o-n.

The Clerk: Take the stand.

Direct Examination

By Mr. Robnett:

Q. Mr. Kosdon, what is your profession? [424]

A. I am an attorney at law.

Q. And have you been such for some time?

A. Yes, sir.

Q. Licensed to practice in the State of California and practicing in the State of California?

A. Yes, sir.

Q. Were you such in the year 1941?

A. Yes, sir.

Q. Acquainted with Sam Ormont?

A. Yes, sir.

(Testimony of Benjamin F Kosdon.)

Q. Did you represent Mr. Ormont in a matter as to a collection of a judgment against Mr. Nolan?

A. Allen you mean.

Q. Allen, I should say. A Yes, I did.

Q. It is Nolan Allen, isn't it?

A. That is correct.

Q. And did you during that time collect a sum of money as a settlement of the entire balance of Mr. Allen's indebtedness to Mr. Ormont?

A. Yes, I did.

Q. And do you have before you Exhibit H?

A. No.

Q. Exhibit N I should say. [425]

A. Yes, I do.

Q. Is that the letter from Mr. Allen's attorney to you with the enclosure of the remittance in full settlement of that account?

A. That is correct.

Q. You received that and the remittance therein referred to, did you? A. I did.

The Court: On or about that date?

The Witness: On or about the date set forth in the letter.

Q. (By Mr. Robnett): What is the date?

A. May 7, 1941, and my file shows May 13, 1941, I was paid my fee.

The Court: Who is the letter from?

The Witness: It is from Hanna & Morton, lawyers in Los Angeles.

The Court: Was there a lawsuit?

The Witness: There was, your Honor.

(Testimony of Benjamin F Kosdon.)

The Court: Were Hanna & Morton the attorneys of record for Allen in that case?

A. I believe they settled before they became attorneys of record.

The Court: They represented Allen in their negotiations [426] with you?

The Witness: Yes, your Honor.

The Court: All right. Cross-examine.

Cross-Examination

By Mr. Strong:

Q. What has this to do with the \$200 we were discussing here through this witness?

A. Are you asking me?

Mr. Robnett: I object to this as not proper cross-examination.

Mr. Strong: I don't know what this has to do with the \$200. There is no connection between that and the settlement of the \$200 whatsoever.

The Court: That is for the jury to decide.

Q. (By Mr. Strong): Does that have anything to do with the \$200?

A. It sets forth I received the money and turned it over on or about May, or some time in May, 1941.

Q. What money?

A. That was received from Nolan Allen.

Q. As to what? A. As to what?

Q. As to what, yes.

A. As to any moneys that I received from Nolan Allen.

Q. What relation did that have with the \$200 testified [427] to by the witness?

(Testimony of Benjamin F Kosdon.)

The Court: Was there a question from the jury? Did you want to ask a question?

A Juror: I would like to ask him——

The Court: You had better wait. We will get to you. We will wait until the lawyers get through asking all the questions they want.

How much money was it?

The Witness: \$325.

The Court: That was the money owing by Nolan Allen to Sam Ormont?

The Witness: That was an agreed amount that was accepted.

The Court: An agreed amount that was accepted?

The Witness: Yes, your Honor.

Q. (By Mr. Strong): Does that amount include the \$200 testified to by the witness Eustice on cross-examination? A. I wouldn't know.

The Court: It couldn't include that because that was a year later, if it was a year later.

Mr Strong: Then what did it have to do with the \$200, your Honor? This is all with reference to the \$200 that Mr. Eustice is testifying about.

The Court: Counsel has stated that his position is that [428] the \$200 was paid a year before Mr. Eustice secured the information from Ormont. He said Allen told him he paid it in '42.

Mr. Strong: Yes.

The Court: And if you must spell it out, this evidence is offered for the purpose of showing that it was paid in 1941.

(Testimony of Benjamin F Kosdon.)

Mr. Strong: Except that this witness says it has nothing to do with that \$200.

The Court: No, he didn't say that.

Q. (By Mr. Strong): Does this have anything to do with the \$200?

A I said I wouldn't know.

Mr. Strong: He doesn't know. There is no evidence that it has anything to do with it. I object to it.

Mr. Robnett: You have no further questions?

Mr. Strong: No.

Mr. Robnett: You may step down, Mr. Kosdon, and I now offer in evidence Exhibit N.

Mr. Strong: Objected to on the grounds stated. that there is no connection between the two transactions whatever.

The Court: The objection is overruled. It is admitted in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit N.)

(Witness excused.) [429]

The Court: This is an appropriate time for a recess.

Remember the admonition.

(Short recess.) [430]

J. BRYANT EUSTICE

a witness recalled by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Robnett:

Q. Mr. Eustice, I am going to return to you your Exhibit No. 40, and call your attention particularly to the page where it is open, which is namely, the last page, and I will call your attention to this portion of it showing payments by Nolan Allen. According to the report you have a memorandum on it, haven't you? A Yes, sir.

Q. And you show, do you not, the last payment on that account was 1941, the sum of \$525?

A. Yes, sir.

Q. You did have another item on there, 1942, \$200, which you have scratched off, didn't you?

A. That is correct, yes, sir.

Q. Therefore, according to your own record, is it not true that there was no payment by Mr. Nolan Allen to Mr. Sam Ormont in 1942?

A. It is possible that he never made any payment in 1942, to him, although the checks were on the same bank account as the previous payment had been. It wasn't detrimental to [431] the taxpayer to consider it——

Mr. Robnett: I move to strike out the statement of counsel.

The Court: It may be stricken.

(Testimony of J. Bryant Eustice.)

Mr. Strong: I did not say anything.

Mr. Robnett: I move to strike the answer as not responsive.

The Court: It is not responsive, instead of the statement of counsel.

Q. (By Mr. Robnett): I ask you to please answer it yes or no: Is it not a fact that, according to your own record, Exhibit 40, being your work sheets, and the very documents which you considered in testifying yesterday, and in making up your returns, or your calculations as to Sam Ormont's income tax for 1942, that there was no payment by Nolan Allen to Sam Ormont of any sum whatsoever in 1942, according to your own work sheets?

A. This is a record of the payments on that note, Mr. Robnett. I cannot say that Mr. Allen did not pay Mr. Ormont \$200 in 1942. The payment came from the same bank account as these other payments, in 1942, and then they quit. He had been getting a series of payments.

The Court: Do you mean you don't know whether he got \$200 in 1942, or not—is that right?

The Witness: No, he got \$200 in 1942 from the same bank [432] account.

Q. From the same bank?

A. The same bank?

Q. The same bank? A. Yes.

Q. What is 16-30—what bank is that, Bank of America?

A. I can't tell, but I can by looking in my briefcase.

(Testimony of J. Bryant Eustice.)

The Court: Just take the briefcase up here, and then you may have it the next time. What bank is that?

A. That is Bank of America, Wilshire and Western.

Q. You don't mean just because checks came from that bank that you deduced that they were from Nolan Allen?

A. I talked to Nolan Allen, your Honor. He had been making a series of payments for some time on these notes, and this was the only \$200 one, this \$200 drawn on the same bank, and then it quit at that time. He did not have his cancelled checks available.

Q. Do you mean in Mr. Ormont's account that was the only money that went through that account, that is, on that bank?

A. Around that time, to the best of my recollection. I don't recall of any other checks.

Q. (By Mr. Robnett): Isn't it a fact, looking at your Exhibit 40, on the page I showed you, that you have scratched off the item you had on there for 1942, as indicating it was incorrect? [433]

A. That I had no record of that, but in just talking with Mr. Allen.

Q. It was after you talked to him. Still you have it scratched off? A. That is correct.

Q. Why did you scratch it off?

A. Because he did not have a record of it.

Q. Why then did you mention it in your testimony yesterday, and testify to this effect, on page

(Testimony of J. Bryant Eustice.)

284; I will read it to you; look at lines 8, 9 and 10 on page 284 of the transcript of yesterday's testimony by you. A. Yes, sir.

Q. You gave that testimony to this effect, did you not? A. That is correct.

Q. (Reading.) "He received payment of a loan that he had previously made to Nolan Allen, of \$200.00." You do so testified yesterday, did you not? A. That is correct.

Q. Then why did you testify to that when you said that Mr. Allen was the only one who had told you, and that you had finally scratched it off on your own Exhibit 40, the work sheets?

A. As the item, by showing it as a loan, from Nolan Allen, was not detrimental to the taxpayer, I did not go into that as carefully as an item I would be taking into income. [434]

The Court: You added it to income not reported.

The Witness: No, your Honor. I did not add it to income, if it did not come from Nolan Allen. It may have been income. I did not take it into account. It certainly did not increase the taxpayer's income in my computation.

Q. It had nothing to do with your computation whatsoever, then?

A. I did not take the item into income, no, sir.

Q. Answer my question: Did that sum of \$200 have anything whatsoever to do with your computation of the income tax of Mr. Ormont?

A. I don't know how to answer it other than the way I did. I tried to explain it specifically.

(Testimony of J. Bryant Eustice.)

Q. Did it have anything to do with your computation, one way or the other?

A. Yes, it did, one way or the other.

Q. And yet, when you testified you knew, did you not, that you had scratched that item off on your work sheet?

A. No, I didn't refer to my notes when I testified to that. I referred to this sheet I have before me right now.

Q. All right. I am going to ask you: Would you testify today the same as you testified yesterday, namely: He received payment of a loan that he had previously made to Nolan Allen of \$200, which, to connect it, your testimony was as of 1942. Would you testify now that Mr. Ormont received \$200 from [435] Nolan Allen in 1942?

A. I would testify that he may have received \$200.

Q. We are trying this man's liberty. You know that, don't you? A. Yes, sir.

Q. That is at stake. It isn't a question of maybe, or may. He has a right to be tried upon facts, and that's all you swore you would testify to—facts.

A. That is correct, to the best of my knowledge.

Q. Will you swear today that Mr. Ormont received the sum of \$200 from Nolan Allen in 1942?

A. No, I wouldn't swear he received \$200 from Nolan Allen in 1942. [436]

Q. Now you also mentioned yesterday the item of \$10,000 which you say was received by Mr. Or-

(Testimony of J. Bryant Eustice.)

mont in 1942 from Sam and Ben Borne in repayment of a loan.

A. Yes, sir.

Q. You testified about that yesterday, didn't you?

A. Yes, sir.

Q. You have testified today that that was not taxable income, haven't you?

A. That is correct.

Q. Why then did you use it in making up your calculations of Mr. Ormont's 1942 taxes?

Mr. Strong: I object, your Honor. There is no evidence that he used it.

Mr. Robnett: I will ask him.

Q. Did you use that in any of your calculations?

A. Not in calculating his income. The only place I used it was accounting for his funds, the tracing of his funds before taking any of these items into income.

The Court: In other words, you didn't charge that to him as income?

The Witness: No, your Honor; quite the opposite.

Q. (By Mr. Robnett): Now you say that in 1942 Mr. Ormont deposited \$990 to his personal bank account. You testified to that yesterday, didn't you? [437]

A. Yes, that is correct.

Q. Did you use that as income for his 1942 income?

A. No, sir, I did not.

Q. Why did you mention the \$990 to the jury then?

A. I was accounting for all of the funds that did not represent income.

(Testimony of J. Bryant Eustice.)

Q. That did not? A. That is correct.

Q. Then you were testifying as to all that did not represent income, were you?

A. To the best of my knowledge that these funds did not represent income.

Q. How could you tell whether that \$990 deposited to his personal account did not represent income?

A. I examined the record of payments at the office of the United Dressed Beef Company where Sam and Ben Borne are located, have their accounts, and I determined the amount of payments that they were making to Mr. Ormont and similarly the check that they were drawn on, and I traced those checks as deposited into his personal bank account, and the ones that I could account for amounted to \$990. I would say that is four payments of \$225 each. The others were not deposited so I could only assume that they were cashed.

Q. Then what you meant to say then in regard to that \$990, or what you mean now to say, is that those were checks from the United Dressed Beef?

A. : From Sam and Ben Borne.

Q. From Sam and Ben Borne? A. Yes.

Q. You testified yesterday that Mr. Ormont received interest checks from Sam and Ben Borne for \$12,090.75. A. \$12,099.75.

Q. Well, the reporter has it \$12,090.75, but you say \$12,099.75? A. That is correct.

(Testimony of J. Bryant Eustice.)

Q. Immediately following that is when you stated he deposited \$990 to his personal bank accounts. You mean that that \$990 was a part of the \$12,099.75? A. (Pause.)

Q. I will show you your testimony so we can get it straight.

A. (Examining transcript.)

Q. Was that what you meant by that \$990?

A. Received interest checks from Sam and Ben Borne for \$12,099.75. Yes, sir.

Q. And the next statement that followed as to him depositing \$990 was from that \$12,099.75, that is what you meant, was it?

A. That is correct; yes, sir.

Q. Well, now, how do you trace the \$990 that you say was by checks? [439]

A. That was by checks; yes.

The Court: In addition to the \$12,099.75?

The Witness: Yes. That was the total figure, \$12,099.75. I traced \$990 of that as going into the taxpayer's personal bank accounts; \$309.75 I didn't.

The Court: \$309.75——

The Witness: Was not deposited.

The Court: Was not deposited?

The Witness: That I could not trace.

The Court: So you did not charge him with the \$990?

The Witness: No, he was not charged with that. I am accounting for the funds that did not represent income in this case.

(Testimony of J. Bryant Eustice.)

The Court: So the interest, all of it was income, was it, \$12,099.75?

The Witness: I said additional income.

The Court: It is all additional income, isn't it?

The Witness: I believe, your Honor, there are some—that is the figure he reported, \$12,099.75 on his income tax return. It has already been reported as income, therefore I would not take it into account as additional income.

The Court: Except you did say that you took into account as additional income the difference between \$990 and \$12,099? Did I understand you correctly?

The Witness: No, sir, I did not take any part of this [440] into income. What I was doing at this operation, the taxpayer had deposited the difference between \$38,535.34 and \$13,038.44 to his personal bank accounts during the year 1942. From his deposit slips I was tracing the items that did not represent income to the taxpayer, or additional income, before I took into account the other checks and cash as representing income that was not explained by the taxpayer.

The Court: What about the difference between \$990 and \$12,099?

The Witness: The \$990 went into his bank account, therefore I did not consider that as additional income.

The Court: But you did consider the difference as additional income?

The Witness: No part of it; no.

(Testimony of J. Bryant Eustice.)

The Court: No part of it?

The Witness: No.

The Court: No part of that \$12,099?

The Witness: No, not as additional income. It had already been reported on his return.

The Court: I misunderstood you then.

Proceed, counsel.

Q. (By Mr. Robnett): You have made the remark just now that items were not explained by the taxpayer, or words to that effect.

A. That is correct; yes. [441]

Q. Did you ever talk to Sam Ormont about his income for any year at all?

A. Yes, sir, for all three years.

Q. When did you ever talk with him?

A. Oh, I believe November 27, 1945, in the office of the Acme Meat Company in the presence of Mr. Phoebus and Mr. Mailin, his accountant at that time.

Q. December what?

A. November 27, 1945.

Q. Had you previously obtained the data that you have in Exhibit 40 or any part of it?

A. Yes, a great deal of it. I had the analysis of his bank accounts and of these certain items that wasn't explained, or asked the taxpayer if he could explain them, or his accountant could explain them, and gave him that opportunity.

Q. Let me ask you this: How long have you been with the Internal Revenue Department?

A. For seven years.

(Testimony of J. Bryant Eustice.)

Q. How many? A. Seven years.

Q. That has been here in Los Angeles?

A. In Los Angeles all the time; yes, sir.

Q. And what particular official position do you hold? A. Internal Revenue Agent. [442]

Q. Is there anyone superior in authority to you in this office? A. Yes, there is.

Q. I beg your pardon?

A. Yes, there are several who are.

Q. There are more than one?

A. Yes. I work directly under a group chief.

The Court: There is an agent in charge?

The Witness: And then there is the Internal Revenue Agent in charge who is over the whole office; yes, sir.

The Court: In other words, the hierarchy of the Internal Revenue Bureau begins with a deputy collector, is that right? That is the lowest, isn't that right?

The Witness: Well, I hate to say lowest.

The Court: He gets the first opportunity at the taxpayer?

The Witness: Certain taxpayers he audits.

The Court: Then above that is the Internal Revenue Agents who are auditors?

The Witness: They audit taxpayers over a certain amount of gross income or net income.

The Court: Who are really auditors?

The Witness: That is correct.

The Court: That is your function, to audit returns?

The Witness: Yes, sir. [443]

(Testimony of J. Bryant Eustice.)

The Court: Then there is an agent in charge of the agents?

The Witness: Yes, your Honor.

The Court: And he divides you up into groups and puts an agent in charge of each group of agents?

The Witness: Yes, sir.

The Court: Then over and above that and fewer in number are the special agents?

The Witness: They are in a different department.

The Court: They are in a different department working under a special chief in Washington, and their function is to investigate any supposed criminality?

The Witness: That is correct, your Honor.

The Court: All right.

Q. (By Mr. Robnett): Let me ask you of the custom, if they have a custom in your office, with regard to checking or auditing and investigating income tax reports. Do you have any particular rule or regulation as to how those are to be done?

A. We have certain rules and procedures of things that we should do and should not do.

Q. Are those written rules, printed rules?

A. Well, some of them are, yes. Some are developed by custom.

Q. There are such rules? [444] A. Yes.

Q. Do you have a set of those?

A. No, I have not.

Q. Do you have them available?

(Testimony of J. Bryant Eustice.)

A. They are available in the library of the Internal Revenue Agent in charge.

Q. I mean, are they available to you?

A. Yes, any instructions are available to me.

Q. In fact, that is one of the things you have to follow, or are supposed to follow, is it not, are those rules?

A. You are referring to special procedure in making audits? Well, a great deal of that is in the discretion of the agent as to how far he should go in making an investigation or an audit, whether he should make a detailed audit or just a cursory audit.

Q. I am particularly interested in any rules that you may have there as to just when, what conditions, you investigate the taxpayer's returns.

A. My first authority on that is the returns of the taxpayers which are presented to me for making an audit.

Q. You take those then and audit them from what appears therein, do you? A. Yes.

Q. And do you then go, if they are not to your satisfaction, you go and see the taxpayer? [445]

A. Well, when the returns are given to me they are given to me for audit and then I go to the taxpayer, that is correct.

Q. That was done in this instance, it was given to you to audit Mr. Ormont's returns?

A. That is correct.

Q. And you did so?

A. That is correct.

(Testimony of J. Bryant Eustice.)

Q. Now when you audited a return of a taxpayer, if you find that his return is not correct on its face, and according to your auditing at least that there are additional taxes due, what do you then do?

A. Well, if the return is in my possession for audit and he is in business, I go out and ask him if he will let me see his books and records. I introduce myself, tell him that I have his income tax returns for such and such years, and I would like to make an audit of his books and records for those years.

Q. And do you ever, before you may see the taxpayer, do you ever send them a statement of additional tax due to give them an opportunity to pay it?

A. Not in connection with my work, no. My returns that come to me is for audit.

Q. Do you know whether or not any department that handles that return before it comes to you to audit have a rule [446] that that is what they do if they find that there are any additional taxes due?

A. I couldn't—

Mr. Strong: Your Honor, this is immaterial.

The Witness: I couldn't testify to other procedures.

Mr. Strong: Just a minute.

The Court: This is preliminary, isn't it, Mr. Robnett?

Mr. Robnett: Yes, it is, your Honor.

The Witness: I wouldn't attempt to testify to the other procedures of the office. I may be wrong.

(Testimony of J. Bryant Eustice.)

The Court: By the way, the agents have authority only to audit. You have no authority to go and collect or settle? That must all run through the Collector?

The Witness: That is correct. We cannot collect taxes or settle the case without review by our office.

The Court: When you finish with your audit do you send it to your head agent and then if it is finally approved somebody else bills the taxpayer?

The Witness: It has to be reviewed and the computations checked and then it goes to the typing department.

The Court: And finally it gets back to the Collector who sends a bill?

The Witness: Who sends a bill. We have nothing to do with the collection of taxes. [447]

Q. (By Mr. Robnett): But after you have finished it and after it has gone through all this other process that you have testified to, if it then is found that there is in their opinion a further tax due they send the taxpayer a bill, is that your understanding?

A. Yes, after they are satisfied that the report is correct he eventually gets a bill.

Q. And in that bill they tell him wherein he is deficient in his payment, do they not?

The Court: Do you know?

The Witness: You mean a copy——

The Court: Do you know?

(Testimony of J. Bryant Eustice.)

The Witness: I don't know as to what they do in every case; no. [448]

Q. (By Mr. Robnett): Do you know whether or not, when they send him a bill, if he pays the amount they send the bill for, whether or not the matter is then closed?

Mr. Strong: Isn't this getting far afield? It is all preliminary, but we haven't gotten to the things it is preliminary to, as yet.

The Court: Objection overruled. Do you know that?

The Witness: No, your Honor. This is getting out of my field altogether. My work is auditing, examining, not collecting. I am not familiar with any of the bills.

Q. (By Mr. Robnett): In this case, this 1942 report of Sam Ormont, that was handed to you for auditing, was it? A. Yes, sir.

Q. Do you know when that was handed to you for auditing?

A. I couldn't fix the date exactly, no. I started the audit on November 8, 1945. It was some time prior to that date.

The Court: Was it a rule of the agent's office that all returns showing an income above a certain amount automatically go to the agents for auditing?

A. Yes, your Honor.

Q. What was that sum, do you remember?

A. I think at the present time it is gross income over [449] \$25,000, or net income above \$5,000. I wouldn't be sure of that. That is the best of my knowledge.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: May I have the answer, please, Mr. Reporter.

(Answer read by the reporter.)

The Witness: That changes from time to time.

The Court: So whether there is any payment made, or anything else, automatically all returns go through that mill, above those figures?

The Witness: No, the collector's office, under a certain procedure, I understand, are authorized to make audits in larger amounts, even as large as the agent's office there.

The Court: What I mean to say is, any return over the base figure is audited by somebody automatically?

A. If I understand your question, all returns?

Q. Yes. A. Not all returns, no.

Q. Over a certain figure?

A. No, your Honor.

Q. (By Mr. Robnett): Then, the 1942 report of Sam Ormont, which was filed, I assume, on or before March 15, 1943, was turned over to you to audit some time before 1945, was it not?

A. I don't believe it was. It was turned over to me some time not too long before November 8, 1945.

Q. When you audited 1942 you audited that before you [450] did any of the other returns, I take it, did you?

A. Well, I wouldn't say that. They are audited pretty much at the same time, where we have three years to cover.

(Testimony of J. Bryant Eustice.)

Q. Didn't you start with the oldest one, or did you? A. Not necessarily.

Q. Do you remember what you did in this instance?

A. I contemplated making a complete audit of all three years, so any information I was taking from the books and records I would cover the three years, at the same time.

Q. I see. Let us take up the items that you say, or said yesterday, I don't know whether you did today—you determined were additional income that had not been reported by Mr. Alman in 1942.

The Court: That's the \$3300 item?

Mr. Robnett: Yes, your Honor, I believe that's right, \$4459.22. Is that the correct amount that you claim was not reported?

Q. You stated one of those items was an item of \$760, did you not?

Mr. Strong: I object to that upon the ground that I don't know which items one of those items would be. There are a lot of items.

The Court: One of the items comprising the \$3359.22—I take it, that is what you mean?

Mr. Robnett: Yes. [451]

A. Yes, one of the items is \$760.

Q. Tell me where and how did you get that item?

A. Well, the first step, I think I have described, was to inspect all of these bank deposits, make a statement of those, showing the amount that was deposited, and where the checks came from, item by item.

(Testimony of J. Bryant Eustice.)

The next step was to trace all of those funds that could be traced to sources that did not represent income. I might state that before doing that I had determined the net worth of the taxpayer at the beginning of 1942, January 1st, 1942. In other words, I had gone back as far as 1931 to determine what assets the taxpayer had as of the beginning of 1942, not only by what the taxpayer told me, but what I could find out for myself independently, and from that information I made up his net worth statement.

From that I knew at the beginning of 1942 what assets he had, such as his business account, his bank accounts, loans that were outstanding, corporation stocks that he owned, government bonds that he owned, and his investment in the Acme Meat Company. And then I investigated as to which of those items had been liquidated, if any of them, how much of those had been liquidated, where the money went to, if that went into his personal bank accounts, and I was able to trace all of those.

I might say I first determined what he had drawn out from [452] his business, \$12,506.09, that he had drawn from his business.

Q. In 1942?

A. Yes, sir. \$12,000 of that he deposited into his bank account. That was as far as I could determine. He drew no more, no less from his business. That is, he received this interest item of \$1299.75, from Sam and Ben Borne. He deposited \$990 of that to his bank account. His bank account

(Testimony of J. Bryant Eustice.)

was also comprised of interest on savings account of \$135.18. He received payments on a loan from Sam and Ben Borne of \$10,000. He deposited **that** to his bank account.

The Court: This is an analysis of the bank account you are making now?

The Witness: Yes. He received the \$200, which I stated yesterday was from Nolan Allen, which there was some question about. However, by putting it here, and considering it not representing income, I did not take it in his income, but I show it on my net worth statement, beginning 1942, as a loan to Nolan Allen. In other words, money that he had accumulated before 1942, which, when it was liquidated, would not be taken into income.

And, in addition to those items that I could trace—and I might say, not only what I could trace, but I have gone back and actually traced those items that came from his business, or were liquidated, and he deposited cash, \$1260 in checks, \$911.72—— [453]

The Court: In his bank account?

A. In his bank account. He had in his bank account, at the beginning of 1942 \$13,038.44.

Q. (By Mr. Robnett): His personal bank account, or Acme?

A. His personal bank account. The total of that amount was \$38,535.44. He drew out of that bank account additional capital or money that he had deposited, and additional capital of the Acme Meat Company, of \$3800. He purchased defense bonds

(Testimony of J. Bryant Eustice.)

from withdrawals from that bank account, of \$7750.

He made payments on personal life insurance of \$1058.58. He made a payment on the 1941 Federal income tax of \$1015.17, and he had other personal expenditures paid by checks, of \$887.40. Total withdrawals were \$14,510.72. That amount taken from the bank balances, plus deposits left a remaining balance remaining in the bank accounts of \$24,024.62, which was the amount shown on the bank statements at the end of 1942.

Q. What was the amount in the beginning of the year? A. \$13,038.44.

Q. How much? A. \$13,038.44.

Q. Is that the total of all his bank accounts?

A. Yes, sir.

The Court: Personal.

The Witness: All of his personal bank accounts. That [454] represented the three personal bank accounts, savings account No. 747, savings account No. 224808, and commercial account in the Security First National Bank.

The Court: What was the figure at the end of the year?

The Witness: \$24,024.62. Having then determined how much of this represented unidentified deposits, I took these items as of January 1st, 1942, and then determined what the taxpayer had on hand at the end of December 31, 1942. This total of these bank accounts, the balance of the loans that he had, his corporation stocks, U. S. Government bonds, investment in the Acme Meat Company, and from

(Testimony of J. Bryant Eustice.)

that I determined he had an increase in his assets of \$11,263.27. That is, during that year he had an increase in assets by that amount of money.

To that I added the payment he made on life insurance premiums of \$1058.15, a payment he made on his 1941 Federal income tax of \$1015.17, and other personal expenses paid of \$1703.24. That was a total amount of \$3776.56.

Adding that to the increase in his net worth gives a figure of \$15,039.83. From that I deducted a portion of the above personal expenses that were deductible on his income tax of \$616.41. That left a taxable net income, shown in this report, of \$14,423.42, which is the exact figure that I concluded by taking into account the unexplained bank deposits.

In other words, this was the second check upon my [455] computation to determine after I got through: Well, is this the correct income of the taxpayer? By picking these items out, item by item, and his net worth, the computation shows he actually had something to represent this increase shown on the tax return. Either way is a sufficient method of computing the tax for income tax purposes.

Mr. Robnett: I move to strike out the last statement as voluntary.

The Court: It may be stricken. I think the question is, what makes up the item of \$3359.22—what items?

Mr. Robnett: The question, your Honor—pardon me.

(Testimony of J. Bryant Eustice.)

The Court: That was what you asked about 20 minutes ago. I have been trying to find out what it was.

Mr. Robnett: I asked him to start with the item of \$760.

The Court: Yes.

Mr. Robnett: The first item. Whenever he gets around to answering that——

The Court: \$760?

Mr. Robnett: Yes. I want to get his breakdown on that.

Mr. Strong: In order to assist, since the witness has mentioned various figures, we prepared a compilation of those figures. I have given counsel a copy, and it might assist your Honor and the witness also.

The Court: Do you have any objection to my receiving it, counsel? [456]

Mr. Robnett: I have none, your Honor, of receiving it. It is not offered in evidence?

Mr. Strong: No. it is just to assist in those figures.

The Court: Those figures he referred to just now?

Mr. Strong: Yes.

The Court: To-wit, a summary of adjustment of income, income not reported, \$3359.22.

The Witness: That was made up of cash deposits to the personal commercial account of Sam Ormont, in the Security First National Bank.

The Court: \$760?

The Witness: \$760.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Where are those deposit slips, please?

A. I believe that is Exhibit 14.

Q. Do you have it before you? A. Yes.

The Clerk: No. 14, don't you have the exhibit?

A. Yes, it is in my hand.

Q. (By Mr. Robnett): Will you kindly show me Exhibit 14 the specific items that you claim constitute income that was unreported by the defendant Sam Ormont in 1942, aggregating \$760?

A. The first item was \$600. They were all from the Acme Meat Company; no income taken into account. [457]

The Court: All from what, the Acme Meat Company?

A. All from the Acme Meat Company.

The Court: \$760?

The Witness: \$600.

Mr. Robnett: Just a minute before you pass that. What is there on these deposit slips that tells you these are all from the Acme Meat Company, or that any of them are from the Acme Meat Company?

A. Well, I can tell you the process I used in determining that. I examined all of the checks of the Acme Meat Company, and particularly the withdrawals of Sam Ormont, and those checks are drawn on the Security First National Bank. It so happened that the business bank account was at the same place as his personal bank account. That is No. 90-903.

(Testimony of J. Bryant Eustice.)

Q. The clearing house number of the bank?

A. Yes. [458]

Q. And every one of the checks listed there are on that bank and they are for \$100 each, and there are six of them in that deposit slip, is that correct?

A. Yes.

Q. Now there is no showing of any dates or anything else on those items as to when those checks were issued?

A. I sat down at the bank with my book here which I have in front of me now showing these deposits which I had copied.

Q. Deposits where, to Sam Ormont?

A. The deposit of \$600, and each of the items listed, from 90-903.

I also had beside me the ledger cards of the Acme Meat Company of the same bank account. I traced these items drawn on 90-903 to see whether they were recorded as a withdrawal from the ledger cards of the Acme Meat Company.

The Court. To see whether similar amounts were, you mean?

The Witness: To see whether similar amounts were; yes.

Mr. Robnett: Now wait a minute.

Q. This deposit slip is dated 1-10-42, isn't it?

A. Yes, sir.

Q. Was there any way, or have you any way of determining from any record that these six

(Testimony of J. Bryant Eustice.)

items were drawn on the Acme Meat Company account and, if so, what information was it [459] that determined that?

A. You mean whether they had been drawn?

Q. Yes, were they all dated the same day as this deposit slip? A. No, they were not.

Q. Have you a record in Exhibit 40 telling when those various checks were drawn that you claim were the Acme Meat Company's checks?

A. Well, some of these checks were drawn, that is, they might be held as evident here that the taxpayer had held these until he had six of them. He was drawing, I believe at that time, \$100 a week and he deposited them all at once to the bank account. The checks themselves indicate that on the back of them. You can tell by the stamp, the cancellation stamp.

The Court: Did you see the checks?

The Witness: I saw all of the checks.

Q. (By Mr. Robnett): And did you take a note of the dates of those checks that you claim were Acme Meat Company checks to Sam Ormont and did you take a note of the bank stamp thereon as to when they were cashed?

A. No. I explained, I believe, the method I used in determining whether these were charged to the Acme Meat Company account.

Q. When you say "these"— [460]

A. The checks that were deposited to this bank account.

(Testimony of J. Bryant Eustice.)

Q. Have you any means of knowing, not just guessing but knowing, that this deposit slip here represents the identical checks you were referring to that were issued by the Acme Meat Company?

A. It would have to——

Q. You can answer that yes or no.

A. We know beyond very much of a doubt when we look that there were six \$100 checks that were deposited to the taxpayers' account in the same bank, and we look at the business bank account and see if they were charged against that bank account. Well, that is the basis on which I know.

Q. You say, "and see that they were charged." You mean you saw that there were some charged against them?

A. That there were six \$100 checks charged to that bank account.

The Court: You say you examined the checks?

The Witness: I had seen the checks there to know that these checks had been drawn on the account but I didn't have the checks with me at the time.

The Court: Did you see the checks to see if they were stamped in the clearing house on that date or perforated paid after that date or on that date, that is, the Acme Meat Company six \$100 checks?

The Witness: I wouldn't testify as to just that particular [461] detail. What I was looking to on

(Testimony of J. Bryant Eustice.)

examining the checks was to determine if any of the checks did not go into the Sam Ormont personal bank account.

The Court: Were they payable to the order of Sam Ormont, those checks?

The Witness: Yes, they were, your Honor.

The Court: You do not remember whether they were all dated the same date or cashed the same time, perforated Paid the same time or not?

The Witness: Oh, no. I determined by examining the checks that practically all of them were deposited to Sam Ormont's personal bank account. Then I made this check to determine whether the checks that were shown on a particular deposit slip were actually charged to the Acme Meat Company account on the day that this deposit slip says, or possibly the day after.

The Court: There were six \$100?

The Witness: There would be six \$100 checks.

The Court: On the Acme Meat Company ledger sheet that would show up, wouldn't it?

The Witness: That is correct.

The Court: It would show up on these exhibits we have here?

The Witness: Yes, your Honor. The two accounts were in the same bank. [462]

The Court: What date is that?

The Witness: January 10, 1942.

The Court: And it shows six \$100 items?

The Witness: Six \$100 items deposited to the taxpayer's personal bank account.

(Testimony of J. Bryant Eustice.)

The Court: And charged against the Acme Meat Company?

The Witness: Yes, sir.

The Court: On that date?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Robnett): That is \$600 of it. Where is the balance of the \$760?

A. None of those were taken into income.

Q. None of what items?

A. None of these six \$100 checks or none of the money that came from Acme Meat Company.

The Court: He was asking you how you made up this \$760 additional income. That is what we have been talking about.

The Witness: I understood he asked me how I knew.

The Court: No, he was asking you for the items that make up the \$760. Let's not waste time with things you didn't take into consideration.

As a matter of fact, I think this is a good time to adjourn. [463] Recess until 10 o'clock tomorrow morning. Remember the admonition.

(Whereupon, at 4:25 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Thursday, May 29, 1947.)

Los Angeles, California, Thursday, May 29, 1947

10:00 A.M.

The Court: United States vs. Ormont and Himelfarb. Are you ready?

Mr. Strong: Ready.

Mr. Robnett: Ready.

Mr. Katz: Yes.

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

The Court: Mr. Eustice.

J. BRYANT EUSTICE

a witness recalled by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Robnett:

Q. At the close of yesterday's session of court, after you had identified in your record six checks for \$100 each, and had testified quite at length on them, the following transpired. I said: That was \$600 of it. What was the balance of the \$760? To which you answered: None of those were taken into income. —Now, I am still seeking from you an explanation of where you got the \$760 item which, on direct examination was used by you in your calculations, and claimed by you to be unac-

(Testimony of J. Bryant Eustice.)

counted for income of Samuel Ormont in 1942. Do you understand what I am seeking?

A. Yes, sir.

Q. All right. Let's confine ourselves to that item of \$760.00, and if the \$600 you testified to was part of the item—I understand it was?

A. No, sir, it was not part of the item. I am sorry; I misunderstood your question yesterday.

Q. It was not any part of it?

A. It was not any part of it.

Q. We will then start with this proposition; answer this question: Where do you find in any of the records which you have, or examined, or had available, the sum of \$760 which you claim Mr. Ormont received as an income in 1942, and did not account for the same?

A. Can I have my work papers? That is——

The Court: Exhibit 40.

The Witness: 40, I believe. I am reading from my analysis of the——

Mr. Robnett: Just a minute. I don't want you to read from it until you show it to me.

Mr. Strong: May I have the statement read?

Mr. Robnett: I don't want you to read from it until you show it to me. [469]

Mr. Strong: Does that mean show it to him in private?

The Court: Show it to him right there, if that's private.

Mr. Strong: Can't he state what the item is?

(Testimony of J. Bryant Eustice.)

The Court: Not until counsel has an opportunity to examine what the witness is going to read. It may be objectionable.

Mr. Strong: All right.

Q. (By Mr. Robnett): You have this opened here, this page. This is Exhibit 40?

A. That is correct.

Q. In general, what is that page intended to represent?

A. An analysis of the deposits to the commercial account of Sam Ormont at the Security First National Bank, Huntington Park.

Q. That covers deposits only, does it?

A. That is correct.

Q. Can you from that page pick out the items which you claim constitute the \$760, if they are embraced in more than one item or, if not, is there a \$760 item there that you can pick out, that you claim was unreported income?

A. Yes, sir.

Q. Will you give me the dates and the amounts of those items?

A. April 3rd—— [470]

Q. Just a minuate, please, until I write it down. April 3rd. This is 1942?

A. 1942,—of \$50 deposit.

Q. \$50.

A. Yes, sir, which was all currency. On September 15, a deposit of \$1166 which was made up of checks and currency. \$380 currency was taken into account, as income, and a check for \$380 currency was taken into account and unexplained.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Just a minute. Will you read the answer to me?

(Answer read by the reporter.)

Q. Please find for me the \$380.

A. A check of \$186 was taken into account also.

The Court: How do you mean,—taken into account?

A. Considered as unexplained income. And on September 30, a deposit for \$430, of which \$330 currency was taken into account as unexplained income.

The Court: How much?

A. \$330.

Q. (By Mr. Robnett): What date was that?

A. September 30th.

Q. September? A. Yes, sir.

Q. That was the entire check, or only a portion of it? [471] A. The \$330 was currency.

Q. Currency? A. Yes, sir.

Q. Now let's see if I understand you correctly. The \$760 item I asked you about was made up of \$50 currency deposit of April 3, 1942, and of \$380 in currency deposited September 15, \$380 check——

A. \$186 check.

Q. You changed that, you changed the \$380 to a \$186 check, is that correct?

A. That is what it is correctly, \$186.

A. All right. And September 30, \$330 currency?

A. That is correct.

Q. That makes up your entire \$760, does it?

A. \$760 cash and \$186 check.

(Testimony of J. Bryant Eustice.)

Q. Then the \$186 formed no part of the item testified to of \$760? A. No, sir.

Q. That is a separate item, the \$186 check?

A. That is correct.

Q. All the others were currency?

A. That is correct.

Q. And deposited in the bank to those particular dates that you have mentioned, to Mr. Ormont's account? A. That is correct.

Q. And the reason that you charged them up to Mr. Ormont as income was merely because you had no other explanation of them? [473]

A. No, sir.

Q. I thought that was what you said, they weren't explained.

A. I was able to determine that he could not have had that much cash that did not represent income?

Q. How were you able to determine that?

A. From tracing his withdrawals from the Acme Meat Company, the taxpayer had had only \$506.09 that he did not deposit in his bank account.

Q. You mean withdrawals from the Acme Meat Company?

A. Yes, sir. That could have been cash on hand, or cash. He received interest checks from Sam and Ben Borne of \$1299.75, of which he deposited \$990 in his bank account. He had \$309.75 that could have been cash, those checks could have.

Now the next question that came in my mind to be answered was, what was the source of the amounts

(Testimony of J. Bryant Eustice.)

that the taxpayer used for personal living expenses. Well, he paid by check \$887.40 and it is obvious the taxpayer could not live on——

Q. Just a moment.

I move to strike that.

The Court: It may be stricken.

Did you check through his bank accounts to see whether he cashed a check? [474]

The Witness: Yes, your Honor.

The Court: Had drawn a check out on any of these various bank accounts?

The Witness: He only had one checking account and I examined all of the checks drawn on that.

The Court: What about the savings account?

The Witness: I examined all of the withdrawals and traced the disposition of any withdrawals that he made from his savings account.

The Court: Even for months before? In other words, might he not have drawn that out a couple of months before and carried it around in his pocket and then put it back?

The Witness: I traced the withdrawals back, I have a very good analysis back, to 1938 anyway, and there was no indication that the taxpayer had any large amounts of cash on hand or drawn out any large amounts of cash to have on hand.

The Court: In 1938?

The Witness: Yes.

The Court: There are some rather large withdrawals in some of those accounts, aren't there?

The Witness: Yes, your Honor.

(Testimony of J. Bryant Eustice.)

The Court: From the savings accounts?

The Witness: Yes, your Honor. I can identify the disposition of those withdrawals. [475]

The Court: Every withdrawal?

The Witness: Yes, your Honor. I can tell you what disposition I made of them.

The Court: Back to 1938?

The Witness: Back to 1938. I have them here in my work papers.

Q. (By Mr. Robnett): Let me ask you: At the beginning of the year 1942 you did not know, did you, how much cash other than bank deposits the defendant Sam Ormont had?

A. At the beginning of 1942?

Q. Yes, other than bank accounts.

A. Except as I have mentioned here from tracing his withdrawals and whether he had drawn any amount of cash that would be in excess of his living expenses for these years prior to 1942.

Q. To '38?

A. To '38. I made analyses back further than that but I say I could make a pretty accurate one from 1938 on.

Q. Weren't you informed by—either you or your associate and have in your Exhibit No. 40—a statement to the effect that the defendant told you at the beginning of '42 he had some cash that was not in the banks?

A. He had told me, yes, during the time that I questioned him, that he had had cash on hand from time to time, [476] that he had substantial amounts of cash on hand.

(Testimony of J. Bryant Eustice.)

Q. Yes, that is right. He told you that he had been doing that for years, didn't he?

A. That is what he said.

Q. Therefore you, when you saw currency coming into these accounts, you didn't allocate them to cash that the defendant had told you he had had on hand for years but because it was currency and you couldn't find where he had withdrawn it quickly before the deposits you simply earmarked it as income, didn't you? A. The answer is no.

Q. Is no? A. Yes, sir.

Q. That is, no, that you didn't give him any credit for the money he had on hand?

Mr. Strong: That is not what he said, your Honor.

Mr. Robnett: All right. I will ask to have the question read. He has answered no.

Mr. Strong: It speaks for itself.

The Court: Read the question and the answer.

(The record referred to was read by the reporter as set forth above.)

The Witness: I can explain my answer to that, if you wish.

Mr. Robnett: I don't care for any explanation.

Mr. Strong: He didn't answer it, your Honor.

The Court: He did answer it.

Do you wish to explain it?

The Witness: Yes, your Honor.

The Court: All right.

The Witness: As regarding the amount of cash the taxpayer stated he had on hand, he would not

(Testimony of J. Bryant Eustice.)

give me any definite amount or state any amount he had on hand at any time, and I traced, attempted, I didn't just simply arbitrarily put this cash into income but attempted to determine if the taxpayer could have had any cash on hand at that time, and from my analysis I could not determine that he had any amount of cash on hand there. And as the items were unexplained I have no alternative but to consider them as income.

Mr. Robnett: I move to strike out the portion of where he said the items were unexplained and I had no alternative.

Mr. Strong: That is part of the answer.

Mr. Robnett: That is a conclusion of the witness.

The Court: It is a conclusion of the witness and may be stricken and disregarded. That is what the jury has to decide, not this witness.

By the way, you say you analyzed all these thousands of withdrawals in these bank accounts here and were able to trace every one of them?

The Witness: Your Honor, not regarding the business bank accounts because he had books and records.

The Court: But Sam Ormont's, in the savings account, in one of them here—I don't know what bank it is on—but here are withdrawals of \$12,000, \$2000, \$1000, \$2000, \$650, \$3000, \$2000, \$5000, \$2000, \$7000, \$5000, the next day \$5400, \$1000, \$2500, \$7600, \$7500, \$4700, \$7500, \$2500—you were able to trace every bit of that money that was drawn out in cash?

(Testimony of J. Bryant Eustice.)

The Witness: I will be glad to identify any, your Honor.

The Court: I am asking you, you were able to trace every bit of it so you could come to a conclusion that the man had committed a criminal act by having money which is income of \$760 in cash?

The Witness: I was able to trace these large withdrawals, your Honor, yes, as to what disposition was made of them.

The Court: Every cent of them?

The Witness: Well, as I say, I refer to the large withdrawals and I believe they are all large withdrawals.

The Court: There are some of \$400, \$100, \$650, \$200, \$450, \$250——

The Witness: In what years, your Honor? [479]

The Court: Well, this \$250, in 1940; \$400, in 1938—two of them, for \$200.

The Witness: Such items as \$250 and \$300, I had to assume, or consider, that they were used for living expenses, and that the amounts I had put or allocated to living expenses were reasonable amounts, and whether the taxpayer was drawing out enough money out of these bank accounts over and above living expenses, that he could have cash on hand.

The Court: In other words, you indulged the presumption that he did not carry any of this money in cash there, and didn't spend it for living expenses?

The Witness: That he did spend it for living expenses.

(Testimony of J. Bryant Eustice.)

The Court: That he did spending it?

The Witness: Yes.

The Court: That he had spent it for living expenses, and did not carry some around in his pocket?

The Witness: Yes, the amount drawn out was not over and above living expenses. There was no evidence he was drawing out large amounts of cash from any of these accounts, and keeping it on hand.

The Court: Did you know his scale of living?

The Witness: I only know that he maintains a home.

The Court: Is he married?

The Witness: He maintains a home and supports his mother.

The Court: You don't know how much money is spent on the [480] home?

The Witness: I only—no, I don't know.

Q. (By Mr. Robnett): You did not go back to his income for 1928, 1929 and 1930 and 1931 and 1932, did you?

A. I made an examination, but when we go that far back, I could not say it was an accurate accounting in years that far back.

Q. You did not make any accounting then back for those years at all, did you?

A. I attempted to determine whether there were any large amounts of cash that could not be accounted for, and I could make a fairly good accounting except for probably several items during that period of years. I think there was one item of \$2000, and there was another item of \$1850 that

(Testimony of J. Bryant Eustice.)

was drawn out. It was all back in 1938. I did not know—could not determine just what disposition he made of those two particular items.

Q. \$2000 and the \$1800 item, you could not tell what disposition had been made of those in 1938?

A. It was back of 1938.

Q. It was back of 1938? In other words, you could not tell? Did you make any examination of amounts the defendant made and earned from any source, during 1928, 1929, 1930, 1931 and 1932?

A. Can I have the question again, please? [481]

(Question read by the reporter.)

A. Well, my examination was an analysis of his bank account; what I could determine from that analysis.

Q. His bank accounts?

A. And from his business account.

Q. During those years I have named, 1928, 1929, 1930, 1931 and 1932?

A. Yes, sir.

Q. You recall, do you not, that during that time we had some little depression occur, and some bank failures, don't you?

A. That's correct.

Q. Did you ask the defendant at any time whether he had kept his money from back years, any of it, other than in bank accounts?

A. He stated that he had.

Q. He stated that he had?

A. Yes.

Q. He also told you, did he not, that during those years he earned considerable money, and did keep a good portion of what he earned in the form of cash, and not in any bank accounts?

A. That is what he stated.

(Testimony of J. Bryant Eustice.)

Q. Let us take up another item. I believe you mentioned the other day that you had several items to make up this [482] thirty-odd hundred dollars that you claimed. You had a \$500 item, didn't you, that you claimed was income?

The Court: What about this \$186 check? Why do you call that income? It was a check from whom, for what?

The Witness: I didn't trace the check to its source.

The Court: You knew it was a check, though?

The Witness: Yes.

The Court: Was it a check to cash?

The Witness: All I can tell, it was a check deposited to his bank account. I could not trace the source to any of the taxpayer's bank accounts.

The Court: Did you determine whether or not his mother had a bank account?

The Witness: Yes, your Honor.

The Court: Did she?

The Witness: Not during that period, to the best of my knowledge.

The Court: Did she ever give him any checks?

The Witness: Not during that period; during the period under audit.

Q. (By Mr. Robnett): You never traced the \$186 check, as to where it originated?

A. That is correct.

Q. But when you saw it there as a deposit you just put [483] it in as an unaccounted income?

A. No, I did not put it in.

(Testimony of J. Bryant Eustice.)

Q. But you did put it in as unaccounted income?

A. It went into unaccounted income.

Q. Did you not know, and ascertain on your investigation, that Mr. Ormont had loaned money to various and sundry people at various and sundry times, over the course of years?

A. Yes, I have mentioned several different loans that were outstanding back in 1942.

Q. Yes. You didn't pretend to make an analysis of all the loans that he had made to people, whether they were then outstanding or not, did you?

A. I attempted, by examining his bank accounts, and business bank account, to determine whether there were any other loans outstanding, and I asked him whether he had any other loans outstanding.

Q. Did he tell you that he loaned various sums of money to people without giving it to them in a check, but handing it to them in currency?

A. May I have the question read, please?

(Question read by the reporter.)

A. No, sir, he did not.

Q. Did you ask him about it?

A. I asked him if he had any other loans outstanding as of January 1st, 1942. [484]

Q. And he told you no?

A. He told me no.

Q. The only ones he mentioned were what ones?

A. I believe the one to Sam and Ben Borne was the only one he mentioned. I determined, from my investigation, that he had the other two loans,

(Testimony of J. Bryant Eustice.)

one which you say was not a loan, to Nolan Allen, of \$200. Then there was another loan to Frank Smith that showed up, that he had made, during the investigation. That is, one showed up during the investigation.

Q. It had been made long prior to the investigation? A. Yes.

Q. Prior to 1942?

A. So that money that came in from those loans was not taken into income.

Q. But this morning in answer to questions, you only mentioned just the one loan to Borne?

A. That is correct.

Q. And you found he actually had other loans out, didn't you? A. Yes.

Q. The one to Smith you testified about?

A. The one to Smith.

Q. And at the time that you asked him that question, isn't it a fact that he told you that he did not know right off hand who all owed him money; that he let various people have [485] money at various times. Some of them had paid back, maybe, and some of them had not fully paid; that he did not keep any account of that at all?

A. He never made any such statement as that to me.

Q. He did not? A. No.

Q. Taking up the \$500 item that you mentioned, where did you get that?

A. That was unexplained cash deposited to the taxpayer's savings account No. 747, in the Bank of America, Soto and Brooklyn.

(Testimony of J. Bryant Eustice.)

Q. That was all one deposit, was it?

A. No, it was several items.

Q. Will you give me the dates and the amounts?

A. February 4, 1942, \$50.

Q. How much?

A. \$50. September 19, 1942, \$50. October 17, \$400, making a total of \$500.

Q. Those items that you just testified to, totaling \$500, that was cash? A. In cash.

Q. And the item of \$186, which you testified to, all the items of \$760, aggregating the \$760, which you testified to—each and every one of those items were shown upon the bank account and bank records of Mr. Ormont's bank book, were they [486] not, as deposits?

A. They were deposits to this particular bank account I have named, yes.

Q. You have an item of \$225.72. What was that?

A. Check deposit on June 30, 1942, \$206.11; check deposit October 17 for \$270.60.

Q. The item is only \$225.72.

A. \$725.72, I believe.

Q. In the record it is only \$225.

A. It should be \$725.72.

Q. Are there some more items? Is that \$270 or \$370? A. \$270.

Q. \$270.60?

A. Yes, the same date checks for \$28.12, \$16.14, \$27.15; a check deposited September 19 for \$177.60. I believe that makes a total of \$725.72. [487]

(Testimony of J. Bryant Eustice.)

Q. In any event, each and every one of those items that you have just testified to you charged up against him as unaccounted for income for 1942?

A. That is correct.

Q. You did that after you had checked all the records, did you, that you would have checked and are using here from Exhibit 40?

A. After I made the examination, yes, that I have testified to.

Q. After you had done that you then charged them all up to him as unaccounted for income, is that correct?

A. That is correct.

Q. You had made a very thorough examination of all the books and records, both of the Acme Meat Company and of Mr. Ormont's bank account when you did that, hadn't you, or bank accounts I should say?

A. I made a thorough examination of his bank accounts and such examination of his books and records as I deemed necessary in the examination.

Q. Knowing at the time, did you not, that you were going to testify in a criminal case against this man?

A. No, sir, I do not know when I make these examinations that I am going to testify in any criminal case.

Q. You knew though after you had made the examination, sometime after it, you did learn that you were going to testify, didn't you, in a criminal case? [488]

A. I knew after there was a grand jury indictment.

(Testimony of J. Bryant Eustice.)

Q. Did you ever at any time go back and re-check any of those items to see whether you had made a mistake or not?

A. I don't know as I understand your question.

Mr. Robnett: Read the question. I think it is understandable. If it isn't, I will try and make it so.

(The question referred to was read by the reporter as set forth above.)

The Witness: Not after once my report was submitted, no.

Q. (By Mr. Robnett): By the way, when did you complete your examination and report?

A. The examination report was completed about March 18, 1946.

Q. March 18, 1946?

A. That is correct.

Q. And when did you turn in your report, if you turned it in to someone?

A. Well, it would be approximately that date.

Q. To whom did you deliver the report?

A. I delivered the report to my office, it goes through my group chief, to the review section for review.

Q. Who would be in charge of that review?

A. Well, at that time—you want the man's name?

Q. Yes. [489]

A. At that time the man's name was Mr. Maddox.

(Testimony of J. Bryant Eustice.)

Q. Where is he, do you know?

A. I believe——

Mr. Strong: What is the difference, your Honor? I object on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

The Witness: Well, he is still with the Government in the Government offices at 417 South Hill Street, the Subway Terminal Building.

Q. (By Mr. Robnett): You mean in the Revenue Department? A. That is correct.

Q. Mr. Eustice, you do know at this moment that the defendant Sam Ormont is now on trial under an indictment charging him with a felony for alleged violation of the Internal Revenue Law in that he failed to account for certain income in 1942, don't you? A. Yes, sir.

Q. You knew that when you testified the other day, didn't you? A. Yes, sir.

Q. I will ask you as to the items you have just given me, the check for \$206.11, I believe another deposit or check for \$270.60, and some other checks which you named (I haven't [490] the amounts written down) aggregating \$725.72, according to the correction of the transcript this morning?

A. That is correct.

Q. Will you testify now beyond all reasonable doubt and to a moral certainty that each and every one of those items constituted unaccounted for taxable income of Sam Ormont for the year 1942?

(Testimony of J. Bryant Eustice.)

The Court: It isn't up to him to decide anything beyond a reasonable doubt and to a moral certainty. That is up to the jury.

Mr. Robnett: That is correct, your Honor, but if nobody will testify to it I don't think the jury could, on a man's testimony, if he is only making it on an estimate or a guess.

The Court: All right. I will allow the question. Read the question.

(The question referred to was read by the reporter as follows:

("Q. Will you testify now beyond all reasonable doubt and to a moral certainty that each and every one of those items constituted unaccounted for taxable income of Sam Ormont for the year 1942?")

Mr. Strong: Well, your Honor, I would like to object to the use of the words "unaccounted for." If he means unreported, that is another matter.

Mr. Robnett: All right, unreported taxable income. Change it to unreported.

The Witness: It is still my opinion as it was at the time that it was unreported income.

Q. (By Mr. Robnett): Just answer the question, please.

The Court: I think that is his answer, his opinion that it was unreported income.

By the way, have you finished on '42?

Mr. Robnett: No, I haven't, your Honor. I am just starting.

(Testimony of J. Bryant Eustice.)

The Court: While you are winding up on the next one, I would like to ask him a question here. Yesterday Mr. Strong handed me a series of sheets, comparative statement of net worth. You gave the defendants' one?

Mr. Strong: Yes, sir. I don't know whether the witness has one or not.

The Court: It is comparative statement of net worth.

Mr. Strong: May I pass one to the witness?

The Witness: I have one.

The Court: You have one before you, Mr. Robnett, 1942 comparative statement of net worth?

Mr. Robnett: Yes, your Honor.

The Court: Then the other is summary of adjustments 1942. [492]

The Witness: I haven't a copy of that before me. Well, I can find it in my report here.

The Court: You have it now?

The Witness: Yes, I have one in my report.

The Court: Now Sam Ormont reported \$11,507.93 was his net income before his allowable deductions, summary of adjustments.

The Witness: Yes, \$11,507.93.

The Court: Yes.

The Witness: Yes, your Honor.

The Court: Then you allowed \$610.41 deductions, isn't that right?

The Witness: \$616.41.

The Court: Yes. Over on your comparative statement of net worth you say that his increase

(Testimony of J. Bryant Eustice.)

in net worth was \$11,263.27, therefore his income was \$11,263.27, isn't that right?

The Witness: No, your Honor. That is his increase in net worth, but then he had other expenditures that are not deductible for income tax purposes.

The Court: That is just what I am going to. His increase in assets was \$11,263.27?

The Witness: That is correct.

The Court: Then on this adjustment here where you finally wind up and show his net income on the comparative statement of net worth of \$14,423.42, the same as you do on your [493] summary of adjustments, is that right?

The Witness: That is correct.

The Court: But over here you say his increase in net worth is the figure I mentioned, \$11,000 some-odd, and you calculate that as his income, and then you disallow certain items that he had claimed as expenditures of \$3776.56, isn't that right?

The Witness: No, your Honor, that isn't the explanation.

The Court: You disallow them, do you not?

The Witness: No, I am determining—I stated on my report that he has an increase, or that he had net income of \$14,423.42. Now on the comparative net worth statement I am accounting for what he did with that money. If he received \$14,423.42, well he must have something to show for it. All right. To start out with, he has to show

(Testimony of J. Bryant Eustice.)

for it \$11,263.27, which is the increase in his assets. But in addition to those assets he made these other payments, on life insurance, on his Federal income tax and other personal expenses.

The Court: Which you disallowed.

The Witness: No, I am just proving my income, your Honor. He had this increase in assets and he also had money to make these other payments. If he didn't make these other payments he would still have the money which would be still an increase in his assets there. But he received the benefits of the payments on his life insurance and the benefits of the payment on his income tax and the benefit of what he paid for personal living expenses, so he must have paid that out of his income.

The Court: Yes, but you disallow it.

The Witness: I added——

The Court: You do not allow it as a deductible expenditure, isn't that right?

The Witness: None of these items are allowed as deductible expenditures.

The Court: So you disallow as non-deductible expenditures a net amount of \$3160, that is \$3776, and then you allowed the deductions of \$616.41?

The Witness: Yes.

The Court: Then your actual increase, claimed increase, comes about by a disallowance of certain deductions?

The Witness: Well, it doesn't exactly work out that way. The man had increased his assets.

The Court: Yes, he had, but he had spent this money for these things.

(Testimony of J. Bryant Eustice.)

The Witness: In addition to that he had paid his living expenses, premium on his life insurance and these other items, amounting to \$3776.56.

The Court: Now your net increase in his net income is only \$2915.49. The difference between \$11,000—well, no, it is the difference between—I have the difference between [495] \$11,000 and \$14,000.

The Witness: \$3531.90 I believe is the net increase.

The Court: I have \$3532. So the net increase is less, is \$3500 and some-odd, is less than the \$3776 which you say he is not entitled to deduct as deductible income, as proper deductions.

The Witness: You understand, your Honor, I am not computing the taxpayer's income, that is, for income tax purposes on this report; I am accounting for his money or his funds.

The Court: You say taxable net income.

The Witness: If he had not paid—supposing that the taxpayer did not have life insurance or he didn't have to pay any 1941 income tax, or he hadn't paid any personal living expenses, somebody kept him for the year, well then he would have had this \$3776.56 in his bank accounts and that amount would have been reflected as a total increase in net worth of \$15,039.56.

The Court: I understand.

The Witness: Because of the fact that he had spent it we have to throw it back into his assets there because he had the use of the money.

(Testimony of J. Bryant Eustice.)

The Court: You ascertained that he did pay life insurance premiums in this amount?

The Witness: From the analysis of his bank account. [496]

The Court: And the Federal income tax, and from his check books?

The Witness: That is correct.

The Court: There was no effort to conceal those facts?

The Witness: No, your Honor.

The Court: All right.

Q. (By Mr. Robnett): You do find in your calculations, do you not, Mr. Eustice, you used that figure of taxable net income as shown by you of \$14,423.42, or did you?

A. I understand you to say that I used this figure?

Q. Yes.

A. I use this figure to prove the accuracy of the amount that I showed in my adjustment, that he had actually had assets to account for this increase in income.

Q. Now in arriving at the increase in assets of the defendant, you took into account a lot of Government bonds, did you?

A. I took into account that he had purchased a lot of Government bonds; yes, sir.

Q. Well, look at your report. Didn't you use those bonds and state that they were part of the taxpayer's worth?

The Court: Increase in net worth.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Increase in net worth; yes.

The Witness: Yes. In making the net worth computation [497] I used the amount of bonds that he had on hand at the beginning of '42 and at the end of '42.

Q. (By Mr. Robnett): Now do you have a record there before you, or did you have when you made these calculations, as to the bonds that you were utilizing in your arriving at the bond figure?

A. Yes, sir, I have.

Q. You have it there? A. Yes, sir.

Q. All right. Let me see it, please.

A. (Producing document)

The Court: You can look at it during the recess. Remember the admonition.

(Short recess.)

The Court: The usual stipulation?

Mr. Katz: So stipulated.

Mr. Robnett: Yes.

Q. (By Mr. Robnett): Mr. Eustice, I show you Exhibit 40, and I will ask you if that page, where I have opened it, is the page you referred to in making up your statement there as to bonds of the defendant Sam Ormont for 1942?

A. No, sir. It's this summary here.

Q. I see. All right. Where does 1942 appear?

A. These first five items.

Q. Where did you get that information from which you made that?

A. From the schedule presented to me by Mr. Phoebus, sitting there.

(Testimony of J. Bryant Eustice.)

Q. Do you know where he got it?

A. He told me that he got it——

Q. No. Do you know where he got it?

A. Not other than what he told me, no, sir.

Q. Nothing but what he told you? Did you at any time check them with the bonds yourself?

A. No, sir, I did not check these with the bonds.

Q. You never saw the bonds then?

A. I never saw the bonds, no, sir.

Q. According to the record you have there, you have, as [499] bonds purchased by Mr. Ormont in 1942, an aggregate of cost of how much?

A. \$8937.50.

Q. I will ask you about two items there. Do you know anything about the item for \$50 bond costing \$37.50. Do you know who purchased that?

A. The bond is in the name of Samuel S. Ormont and Mrs. Dora Goldberg.

The Court: Do you know who bought it? That is the question. His question is: Do you know who purchased it?

The Witness: All these bonds——

The Court: No, do you know who purchased it?

The Witness: Of my own information, I do not.

Q. (By Mr. Robnett): You don't know who purchased any one of the bonds that you have listed there for 1942 as belonging to Mr. Ormont, of your own knowledge?

A. I know yes, of two of the bonds.

Q. What two?

A. The one purchased on February 9, 1942, for \$3750.

(Testimony of J. Bryant Eustice.)

Q. Five \$1000 bonds? A. That is correct.

Q. You know of your own knowledge who purchased those?

A. Yes, I know where the funds came from to purchase the bonds. [500]

Q. I asked you if you knew who purchased them?

A. I think I am correct in my statement that Sam Ormont purchased them.

The Court: You mean you deduced that he purchased them?

The Witness: Perhaps that is correct, your Honor.

The Court: You don't know that he purchased them?

The Witness: They were purchased with funds drawn out of his bank account.

The Court: But you don't know that he purchased them?

The Witness: I have no further evidence than that, no, sir.

Q. (By Mr. Robnett): What information have you as to the funds drawn out to purchase those bonds?

A. He purchased them from funds in his savings account No. 224808, Security First National Bank, Huntington Park.

The Court: You mean the savings account shows withdrawal of that sum on money on or about that date? A. That is correct.

(Testimony of J. Bryant Eustice.)

Q. And the bonds showing up in his name, therefore you deduced he took that money to buy those bonds?

A. That is right.

Q. (By Mr. Robnett): That is the reason you say he purchased them, isn't it?

A. These particular bonds, yes. [501]

Q. Each and every one of those bonds you have listed there were made in whose names?

All the bonds for 1942 are in the name of Samuel S. Ormont or Mrs. Dora Goldberg.

Q. Nevertheless you, in your accounting in your comparative statement of net worth, charged all of the bonds up to Mr. Ormont as his, didn't you?

A. That is correct.

Q. You didn't—

A. Pardon me. Can I have the question again? I am not sure I answered it correctly.

(The question referred to was read by the reporter, as set forth above.)

The Witness: In my net worth accounting.

Q. (By Mr. Robnett): Yes.

A. Yes, that is correct.

Q. And in your calculation of his income for the year 1942 you charged him with the total cost of those bonds as being part of his income, didn't you?

A. No, sir.

Q. You used it in arriving, did you not, at the increase in his assets?

A. In arriving at the increase in his assets; yes.

Q. Well, you then deducted what you claim were his [502] assets from the beginning of the year from

(Testimony of J. Bryant Eustice.)

that item that you had as his assets at the end of the year, which latter item included all of these bonds you have testified about, and that is how you arrived at the increase in assets of \$11,263.27, didn't you?

A. The increase in assets was \$8,937.50.

Q. Oh, it was? A. Yes, sir.

Q. Well, the paper I have says increase in assets, \$11,263.27.

The Court: That is what mine says too.

The Witness: I thought you were referring to United States government bonds, the increase in those bonds.

Q. (By Mr. Robnett): No, that wasn't the question.

A. The increase in assets was \$11,263.27.

Q. Then what you have just said as to the \$8,937—was that the figure you just gave?

A. That is correct; yes, sir.

Q. That constitutes a portion of the \$11,263.27 increase in assets, doesn't it?

A. It is taken into consideration in this computation.

The Court: As an increase?

The Witness: As an increase in assets; yes, sir.

Q. (By Mr. Robnett): And it constitutes exactly that [503] amount, \$8,937.50 of the \$11,263.27, doesn't it? A. No, sir, it does not.

Q. It does not? A. It does not.

Q. How much does it constitute of the \$11,263.27?

(Testimony of J. Bryant Eustice.)

A. We are computing the increase in assets there at the beginning of the year and at the end of the year, and we have decreases on one side and increases on the other, and the \$11,263.27 is the net increase. You can't separate one item from the others. When we arrive at this figure of \$8,937.50, that is made up of items on the other side and it is balanced off by reductions of his bank account for the money that was drawn out of his bank account, and then in addition to that there was \$1137.50 that did not come out of these bank accounts, so the increase in this particular item is only 1137.50.

Q. From these bonds?

A. That is correct. Let's see if I have the figure that I gave you correct. (Examining document) \$1187.50.

Q. \$1187.50? A. Yes.

Q. You did not trace out from his bank book or any of his money anywhere the purchase by him of the \$50 bond and the \$100 bond you have on that list, did you?

A. That is correct. There are three bonds that were [504] purchased with unexplained funds.

Q. What were the total of those?

A. The total cost was this figure of \$1187.50.

Q. Of bonds you did not trace out as to where the money came from?

Mr. Strong: I object to that. That is not what the witness said.

The Court: He is asking him.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Is that correct?

A. May I have the question again?

(The question referred to was read by the reporter, as set forth above.)

The Witness: In my tracing I determined that they didn't come from any known source.

Q. (By Mr. Robnett): Any known source of his, isn't that correct? A. That is correct.

Q. And the bonds were in the name of another party as well as in his name?

A. In his mother's name as well as his name.

Q. Nevertheless you couldn't trace out the known source but you just charged them up as his in increasing his assets to that extent? That is the way you increased that increase in assets to the amount you just testified, \$1187.50, isn't it? [505]

A. No, sir.

Q. It isn't?

A. If you leave out the word "just," I believe the answer would be yes.

Mr. Robnett: All right. Read the question, Mr. Reporter, and maybe I will leave it out.

(The question referred to was read by the reporter, as follows:

("Q. Nevertheless you couldn't trace out the known source but you just charged them up as his in increasing his assets to that extent? That is the way you increased that increase in assets to the amount you just testified, \$1187.50, isn't it?")

(Testimony of J. Bryant Eustice.)

Mr. Robnett: I will strike out the word "just" and take the witness' answer.

Q. You made no effort to determine whether his mother purchased those bonds herself or not, did you, those particular bonds?

A. Can I answer that by an explanation?

The Court: You can say whether you did or not. Did you or didn't you? Yes or no.

Q. (By Mr. Robnett): Just answer yes or no.

A. The answer would be no.

Mr. Strong: May the witness give his explanation? He [506] has indicated that that is not a complete answer.

Mr. Robnett: He didn't make any so I don't know how he can explain what he didn't do.

Mr. Strong: He answers a question as it is asked, your Honor.

The Court: He said he made no effort, so that's that.

Mr. Strong: But he has indicated he wants to explain it.

The Court: I do not think that requires any explanation.

Q. (By Mr. Robnett): Now as to all other bonds on that list of '42 that you have testified concerning, did you ever trace out to find out where the bonds came from, who purchased them?

A. That is the other bonds?

Q. Yes, the ones in '42.

A. Yes, I was able to determine where the funds came from to purchase the other bonds.

(Testimony of J. Bryant Eustice.)

The Court: You mean when you say you were able to determine that, you were able to reach an opinion to your satisfaction?

The Witness: Well, in this case by satisfaction on that was that they did not come from funds that represented income in the case of the other two bonds. They came from the taxpayer's personal bank accounts and those amounts were not taken into income.

Q. (By Mr. Robnett): Now if Mr. Ormont didn't pay [507] \$1187.50 on account of the purchase of some of those bonds, and if on the other hand his mother or someone for his mother besides he did pay that money and purchased the bonds, then to that extent would you not have to reduce in your comparative statement of net worth the amount that you have for bonds in 1942 in the sum of \$1187.50?

A. If the funds that purchased those bonds did not come from the taxpayer, or didn't have their origin in funds of the taxpayer, the answer would be yes, it would be reduced.

Q. You don't know that they did have their origin from the taxpayer's funds, do you?

A. Yes, I do. I believe the answer would be that I do know that the funds had their origin from the taxpayer. [508]

Q. I thought you testified awhile ago that you did not trace—did not know where the funds came from; that you could not find them?

(Testimony of J. Bryant Eustice.)

A. You would not allow me to explain my answer at that time. I would be glad to give my explanation now.

Q. But you answered my question, and said no, you did not know?

A. This question is worded differently.

Q. Now, Mr. Eustice, in your comparative statement of net worth, you did not at any time know, did you, of your own knowledge, how much cash Sam Ormont had on the 31st day of December, 1941, other than money in banks?

The Court: I think you asked him that awhile ago, and he said he did not know.

A. I believe I answered that question.

The Court: Isn't that correct?

The Witness: I believe that is correct, your Honor.

Q. (By Mr. Robnett): You do not, in your comparative statement, give any account for any cash he may have had at the beginning of 1942, that is, currency?

A. Yes, I have explained my reason for that, I believe.

Q. I understand, but you did not do it?

A. No, I did not give it.

Q. If he had any cash at that time that would have [509] reduced the increase in assets that you have shown on the exhibit, of whatever cash he may have had?

A. Yes, it would show as cash on hand at the beginning of 1942.

(Testimony of J. Bryant Eustice.)

Q. You also have an item, have you not, in your comparative statement, of a loan to Nolan Allen, of \$200, concerning which there was testimony yesterday? A. That is correct.

Q. Did you, in that statement, utilize that item of \$200 as an increase in assets?

A. No, I used it as a decrease in assets.

Q. And why?

A. Because when I looked at these two checks for \$100 each, drawn on the bank account 16-80, which was the bank account under the name of Nolan Allen, I had to make up my mind——

The Court: Which was drawn on the bank account?

The Witness: Bank. Did I say account? Excuse me.

The Court: Yes.

The Witness: I had to make up my mind—there were two ways to handle it: It was either unaccounted or unexplained income, or it represented money that was due the taxpayer. I gave the taxpayer the benefit of the doubt in this case, and did not include it in his income.

Mr. Robnett: We are grateful to you once.

The Witness: As he had been receiving money from Nolan Allen, the indications were that these checks came from the same bank, and I considered that possibly Nolan Allen did owe him \$200 at the beginning of the year. So I considered that was an asset that he had on hand, and as it is shown here, it is taken into account as a decrease in his assets.

(Testimony of J. Bryant Eustice.)

Q. In your examination you have testified, I believe, that you would check back over all the books and records and bank statements, and trace the checks out as to where they originated, or came from, in order to determine whether it was income, or was not income, is that correct?

A. That is correct.

Q. You did that in each and every instance or instances just as carefully as you did in other instances, did you?

A. So far as I know, the answer is yes.

Q. And you testified this morning that there was unaccountable, and therefore you claimed there was a tax due from the defendant on unaccountable income, in the aggregate amount of, I believe it was eight hundred and some dollars, which was constituted of a check for \$206.11, and checks for \$27.60, \$28.12, and some other small items. Do you know the items I refer to?

A. Yes, sir.

Q. Keeping in mind now the check for \$206.11, what do you show on that as to why that is charged as income [511] unaccounted?

A. I did not trace that check as having its origin in any of the taxpayer's known bank accounts.

Q. Where did you trace it as having its origin, if at all?

A. I didn't trace this particular check. I didn't trace every check that went into the taxpayer's bank account to their source. I did some of them. If I did, I would be doing it yet.

(Testimony of J. Bryant Eustice.)

Q. Some you did, and some you did not?

A. Yes.

The Court: He said if he did he would be doing it yet.

Q. (By Mr. Robnett): That you did not trace?

A. Yes. There were quite a few I did not trace. I traced a representative amount.

Q. How could you, not knowing the origin of this check, claim it was income, if you did not trace it to find out whether it was or was not?

A. I traced it. It did not come from any of the taxpayer's own sources.

Q. What do you mean, it did not come from any of the taxpayer's own sources?

A. Looking at the net worth statement, money he drew from any of his personal bank accounts. It was not in payment [512] of any of the loans that I could determine, and it was not drawn from his business bank account.

Q. Do you mean the Acme Meat Company's account?

A. The Acme Meat Company's account.

Q. You traced that out?

A. That's the indication I have here.

Q. You wouldn't make that indication there if you had not done it, would you?

A. If I hadn't made an effort to find it, no.

Mr. Robnett: I would like to have this marked as an exhibit, our next exhibit.

The Clerk: O.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: And this one will be the next one.

The Clerk: P.

The Court: O and P—checks?

The Clerk: Yes.

(The documents referred to were marked Defendant Sam Ormont's Exhibits O and P for identification.)

Q. (By Mr. Robnett): I am going to show you Exhibit O, and ask you to look at that.

A. Yes, sir.

Q. Did you ever see that before?

A. It's quite possible that I have seen the check before, because it is a check drawn by the Acme Meat Company. [513]

Q. Dated what date? A. On May 11, 1942.

Q. To whom? A. Sam Ormont.

Q. How much? A. \$206.11.

Q. Endorsed by Sam Ormont, isn't it?

A. That is correct.

Q. Marked paid by the bank?

A. Marked paid by the bank.

The Court: Perforated?

The Witness: Yes, sir.

Q. (By Mr. Robnett): That corresponds with the item that you have charged up as unexplained income, of that amount, that you have just testified to, doesn't it?

A. It appears that it does, yes.

Q. Now, I show you Exhibit P. I offer check O in evidence.

(Testimony of J. Bryant Eustice.)

Mr. Strong: No objection.

The Court: Admitted.

(The document referred to was marked Defendant Sam Ormont's Exhibit O and was received in evidence.)

Q. (By Mr. Robnett): Did you ever see that before? [514]

A. It is quite possible I have. The check is drawn on Sam Ormont's personal bank account.

Q. What date? A. On May 11, 1942.

Q. To whom?

A. It looks like Arthur P-a-c-h-i-o.

Q. For how much money? A. \$206.11.

Q. Signed by Sam Ormont, isn't it?

A. Signed by Sam Ormont.

Q. How is it endorsed?

A. By Arthur—the same name that appears—

Q. On the Check? A. Of the payee, yes.

Q. It shows it is marked paid by the bank, with a perforated payment stamp?

A. That is correct.

The Court: Is that Sam Ormont's personal account?

A. Sam Ormont's personal account.

Q. (By Mr. Robnett): On the Security First National Bank, Los Angeles?

A. That is correct.

The Court: That is the same bank account that you had reference to in your testimony? [515]

A. That's the personal bank account.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: I offer that in evidence.

The Court: Admitted.

Mr. Strong: No objection.

The Court: It is already admitted.

(The document referred to was marked as Defendant Sam Ormont's Exhibit P and was received in evidence.)

Q. (By Mr. Robnett): Now, Mr. Eustice, that you have seen these two checks just shown you, Exhibits O and P, I will ask you if, as a matter of fact, those items do not show absolutely to you that the item of \$206.11 which you testified about this morning as being unexplained, and therefore charged as income, was not income?

A. That is correct. If I had observed the situation as it was that would possibly be \$206.11 less, and that would not have been taken into income.

Q. Now you also audited, did you not, the income tax return of Sam Ormont for 1943?

A. Yes, sir.

Q. And in doing so——

The Court: Just a moment. Where did you drop this \$206.11 in your calculations, in income not reported?

The Witness: That is correct; yes, sir.

Q. (By Mr. Robnett): That is one of the items—to go back to that—that is one of the items that you had claimed and testified here was unaccounted for income?

The Court: That made up the item of \$3359.22?

(Testimony of J. Bryant Eustice.)

The Witness: Yes, it is included in that total item.

Q. (By Mr. Robnett): Now as to the 1943 income tax report of Sam Ormont, on the face of that report did you make any different calculations as to those things that were reported than the figures and calculations made on the return that was filed?

Mr. Strong: That is ambiguous. I don't know whether he is asking as to the process or the particular items. I object to that.

The Court: Read the question.

(The question referred to was read by the reporter as set forth above.)

The Court: Objection overruled. [517]

The Witness: If I understand the question, it is whether there was any increase in income over the return filed.

Mr. Robnett: No.

Q. In the first instance, I want to know—I think you claim that there was unaccounted for income—but I want to know whether or not you calculated the income that was reported any differently than it was on the return.

The Court: In other words, if there was any claimed error on the face of the return?

Mr. Robnett: That is right.

The Court: In other words, did you shift the salary around in this one like you did in the other one?

(Testimony of J. Bryant Eustice.)

The Witness: Yes. There was \$650 of salary.

Q. (By Mr. Robnett): That is the first item, isn't it?

A. Yes, changed from salary to income from partnership.

Q. You did exactly the same thing on that item that you did on the \$5200 item in the 1942 return, didn't you? A. Exactly the same thing.

Q. Now were there any other changes you made on the figures as given on the return?

A. That was all. I made increases in the other figures that were on the return in my adjustments.

Q. I am only speaking—— [518]

A. There is no other switches like this.

Q. You made increases by reason of what you claimed to be unreported income, is that what you mean? A. That is correct; yes, sir.

Q. You didn't make any increases or changes here that would increase his tax substantially on the items as he accounted for them, did you?

A. I can't say that I understand that question clearly.

Mr. Robnett: Will you read the question?

(The question referred to was read by the reporter as set forth above.)

The Witness: I think that is exactly what I have done on some of these returns.

The Court: He means on the face of the return other than the \$650.

The Witness: No.

(Testimony of J. Bryant Eustice.)

The Court: That wouldn't increase it substantially?

The Witness: That is correct, your Honor.

Q. (By Mr. Robnett): Now you say that you claim that Mr. Ormont had income that was not reported on this 1943 income and which was claimed was taxable income that is unreported, as you claim?

A. That is correct.

Q. In this report appears—have you it before you?

A. Yes, I have the copy of my adjustments here.

The Court: Do you mean you want the return?

Mr. Robnett: Yes.

The Witness: I haven't the return; no.

Mr. Robnett: It is Exhibit 2, I believe.

The Court: Here it is.

(The document referred to was passed to the witness.)

Q. (By Mr. Robnett): What was the total income reported by Sam Ormont for the year 1942?

A. 1943?

Q. 1943, yes—pardon me.

A. Total income reported on the return was \$12,544.67.

Q. Now will you give me the items that you claim should have been included in that report and which you also claim were not as income?

A. Yes. The first adjustment was for dividends, \$33.75.

Q. While on that subject, where did you claim that dividend came from?

(Testimony of J. Bryant Eustice.)

A. From dividends on stock owned and that was in possession for him at Merrill Lynch, Pierce, Fenner & Beane.

Q. If I recall your testimony, you did that because you say that on their books they had credited him with \$33.75 as dividends?

A. That is correct. [520]

Q. Is that correct? A. Yes, sir.

Q. You had no evidence to show that he, Sam Ormont, ever collected that \$33.75 from that concern, did you? A. Yes, sir, I had.

Q. When did he collect it? A. In 1945.

Q. The return of 1943 made by Sam Ormont, does that show that it is made on an accrual basis or a cash basis?

A. It says here it is made on a cash basis.

Q. In your investigation and in your final report and analysis and calculations, how did you calculate his 1943 tax, on an accrual basis or on a cash basis?

A. It was accrual as to his business.

Q. As to what business? The Acme Meat Company?

A. The Acme Meat Company; yes, sir.

Q. And as to his personal income, was it on a cash or accrual basis?

A. It apparently—that is, it states here it was on a cash basis. That is the way it could be considered, that he was reporting income of his business on an accrual basis and he could be reporting the other income on a cash basis. It is not property indicated on the return.

(Testimony of J. Bryant Eustice.)

Q. I am not asking you about the return; I am asking you how you calculated it and how you reported it on your [521] final report.

A. As being on an accrual basis.

Q. The entire thing, did you, that is, both his business, the Acme Meat Company, and likewise Sam Ormont's personal income?

A. Well, I state this, that it didn't make any difference on these items either way.

Q. It what?

A. It didn't make any difference regarding the amounts taken into income, whether he was on a cash or an accrual basis.

The Court: That isn't the question. That is the thing we have to decide, Mr. Witness.

Mr. Robnett: I move to strike the answer.

The Court: How did you calculate it, on an accrual basis for his personal income?

The Witness: Well, I believe on a cash basis, we will say.

The Court: You made all your calculations then on a cash basis for Sam Ormont individually?

The Witness: Yes. I will state that the individual was on a cash basis.

Q. (By Mr. Robnett): What does your Exhibit 40 show as to how that stock—may I have those exhibits—I will ask you to examine [522] Exhibit 26 in this case and tell me whether or not that is the transaction upon which there was that dividend credited that you have charged up against Mr. Ormont for 1943.

(Testimony of J. Bryant Eustice.)

A. Well, that is \$30 of it was dividends from this item here, Standard Brands.

Q. Yes.

A. Then he purchased other stock. He had 15 shares of Socony-Vacuum Oil Company, from which he received dividends of \$7.50.

The Court: Were they paid to him or credited to his account?

The Witness: They were credited to his account.

Q. (By Mr. Robnett): Now what I am getting at is, was that account and that stock carried in the name of Sam Ormont individually or was it in the name of the Acme Meat Company?

A. In the name of Sam S. Ormont, it says.

Q. And you calculated all Sam Ormont's personal business, as distinguished from the Acme Meat Company business, on the cash basis, didn't you?

A. I so stated.

Q. And I believe you have also stated that none of that \$33.75—is that the total dividend that you stated?

A. \$33.75.

Q. That that money was not received by Sam Ormont [523] until some time in 1945?

A. That is correct. It was constructively received by him in 1943.

Mr. Robnett: I move to strike out the answer.

The Court: It may be stricken.

Mr. Strong: May the witness explain why he took that in for that year?

The Court: The witness doesn't have to make an explanation of what the law is. It is up to me

(Testimony of J. Bryant Eustice.)

to decide whether or not it was constructively received, and for the jury to decide whether he actually received it or not, and if so beyond a reasonable doubt and wilfully concealed it. The witness cannot testify as to what the law is. It is a rank conclusion.

Mr. Strong: I thought he was testifying as to why he took it in for the year 1942.

Mr. Robnett: No.

The Court: He answered the question. The jury are instructed to disregard the witness' statement that it was constructively received.

Q. (By Mr. Robnett): Let's take up the next item that you claim was not accounted for income in 1943.

The Court: By that token, Mr. Witness, would people constructively receive their dividends on their war bonds [524] each year as they increased in value?

The Witness: They can report it that way. It has been made optional. That is my interpretation by reading the law on it.

The Court: Whether they cash it in or not?

The Witness: Yes. They can report it as income each year or wait until they cash in the bonds.

Q. (By Mr. Robnett): There is a special provision, is there not, as to Government obligations in that regard?

(Testimony of J. Bryant Eustice.)

Mr. Strong: Is that a question as to law, your Honor?

The Court: Your objection is good. It will be sustained.

Q. (By Mr. Robnett): Let's take up the next item——

The Court: Before you go to the next item, I see it is 12:00 o'clock. We will recess until 2:00 o'clock. Remember the admonition.

Mr. Strong: Your Honor, tomorrow is a holiday——

The Court: That is right. There will be no court tomorrow and when we recess tonight we will recess until 2:00 o'clock Monday afternoon. So you can make your plans accordingly.

Mr. Strong: Thank you.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.) [525]

Los Angeles, California, Thursday, May 29, 1947
2:00 P.M.

The Court: United States vs. Ormont and Himelfarb. The usual stipulation, I take it?

Mr. Strong: Yes, your Honor.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

The Court: Mr. Eustice.

J. BRYANT EUSTICE

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Robnett:

Q. Mr. Eustice, I want to refer back to 1942; and referring to your summary for convenience, to the second item of \$37.50—do you find it?

A. Yes, sir.

Q. That item is called “Dividends,” isn’t it?

A. That’s correct, yes, sir.

Q. Where did that come from?

A. That’s from dividends on stock owned by the taxpayer, and held for his account by Merrill Lynch, Pierce, Fenner & Beane.

Q. The same situation as to that as was to the item of [529] \$33.75, dividend testified to this morning, was it? A. Yes, sir.

Q. That is to say, it was with the same company, and merely a credit to his account with them? There was no payment in 1942, was there?

A. The same condition. He received a statement from them of his account showing that the dividends were credited to his account.

The Court: He did not draw any money down in 1942?

A. He did not draw any money down in 1942.

Q. (By Mr. Robnett): The money was not drawn until 1945, was it?

A. It was not drawn until 1945, no, sir.

(Testimony of J. Bryant Eustice.)

Q. Let us take up the third item, the second portion of the third item, interest, \$135.18. How and where was that item made up?

A. That interest on savings bank deposits.

Q. In what bank? Have you the number of the account there?

A. I can tell very shortly. \$57.50 went to the savings account at the Security First National Bank; \$77.68 to the Bank of America Savings account.

Q. Seventy-seven and how much?

A. .68.

Q. And what was the other item, please? [530]

A. \$57.50.

Q. \$57.50. Was that all one item, or was it made up of more than one item, that \$57.50?

A. Well, I would like to refer to the account. Usually interest credits are made twice a year, June 30th and the end of December. If it is material I can look it up.

Q. Will you kindly refer to your exhibit there, and look it up?

A. Yes, \$27.75 credited June 30, 1942.

Q. \$27.55?

A. \$27.75. And \$29.75 was credited December 31, 1942.

Q. That makes the \$57.50? A. Yes, sir.

Q. Did you break down the other item, the 77 plus that you testified to?

A. \$30.87 credited on June 30, 1942; and \$46.79 on December 31, 1942. [531]

(Testimony of J. Bryant Eustice.)

Q. That was the total of that bank account?

A. That is correct.

Q. Now going back to 1943, you testified, I believe, on direct examination that you took into account in figuring that Mr. Ormont, in your opinion, had some income that was not accounted for and that was taxable income for the year 1943, certain bonds and bond purchases, did you?

A. That is correct.

Q. Now will you refer to your bond record, or whatever you may need to there, and tell me how many bonds you show that he had in the beginning of 1943?

A. That is the total cost price of the bond?

Q. Yes, the cost price. A. \$45,187.50.

Q. That was the amount at the beginning of the year 1943, was it? A. That is correct.

Q. How many bonds did you show that he had at the end of 1943? A. \$96,662.50.

Q. 96 what? A. \$96,662.50.

Q. Or a differential or an increase of \$51,000 plus, was it? A. \$51,475. [532]

Q. Do you have before you, and did you have when you made the calculations, a list of the bonds that you took into account when you made your calculations?

A. Yes, I had a list of the inventory of the bonds.

Q. As to which list, did you make it?

A. No, I did not make that list.

(Testimony of J. Bryant Eustice.)

Q. Did you check the bonds?

A. No, sir. The answer is the same as I made before. I did not check the bonds.

Q. And you never saw the bonds then yourself? A. I never saw the bonds.

Q. But you based it entirely upon the record that you have before you as to the serial number, the dates purchased and who purchased them, whose names they were in and the amount paid for them, did you?

A. I based it on a list that was given to me; yes.

Q. Now on that record, I will ask you if, as a matter of fact, it doesn't show that all of those bonds purchased in 1943 were purchased in two names.

A. They were purchased in two names; not always the same two names.

Q. I understand. But I am asking you if they don't show that they were all purchased in two names. A. Yes, sir.

Q. The defendant, in other words, was *only of* the purchasers [533] or one of the persons named as purchaser in the bond, or payee in the bond, isn't that correct?

A. Yes, that is correct.

Q. Will you give me the serial numbers, if you have them, the date of purchase and the amount paid for the bond or bonds purchased on such dates in 1943 as you had before you when you were making the calculations?

A. That is for each and every bond purchased in 1943?

(Testimony of J. Bryant Eustice.)

Q. Yes, and the kind of a bond.

A. On January 18, 1943, he purchased seven \$1000 Series G bonds, Numbers——

Q. Is that all of that item?

A. This all applies to this one item.

Q. I don't want to stop you. Has that finished that item of those seven bonds?

A. Well, I was giving you the serial numbers of them.

Q. All right.

The Court: You say he purchased. You mean they were purchased in his name and some other person's name?

The Witness: Yes. The defendant said that these were his bonds when I discussed the matter of the bonds with him.

The Court: He did?

The Witness: Yes, sir.

The Court: What names are those in?

The Witness: Most of the bonds are in the name—— [534]

The Court: No, those seven.

The Witness: These are in the name of Sam Ormont or Mrs. Dora Goldberg.

Q. (By Mr. Robnett): Those seven are?

A. Yes.

Q. Will you kindly give the serial number and then take each item of bonds thereafter giving the serial number, the date, the amount and the names of the persons in the bonds as shown by your memoranda?

(Testimony of J. Bryant Eustice.)

A. To continue where I left off, the serial number was 1172475G to '81. The bond was in the name of Sam Ormont or Mrs. Dora Goldberg.

On February 15, 1943 he purchased one \$1000, Serial No. M3636561E. That was also in the name of Sam Ormont or Mrs. Dora Goldberg.

On February 17, 1943 he purchased one \$1000 bond No. M3572394E. This bond was in the name of Sam Ormont or Mrs. Sue Kosdon.

On April 12, 1943, one \$1000, M1282364G. It was in the name of Sam Ormont or Mrs. Dora Goldberg.

All of the following bonds are also in the name of Sam Ormont and Dora Goldberg if that is satisfactory so I won't keep repeating it.

Q. All right. Very well. [535]

A. On April 22, 1943 he purchased one \$1000 bond No. M1330102G.

On May 5, 1943 he purchased ten \$1000, Nos. M1453077G to '86. I wasn't quite accurate as to that. There is one of these bonds, which is No. 105307G, which was in the name of Sam Ormont only.

On June 5, 1943 he purchased one \$1000 bond, M1346604G.

On June 25, 1943 he purchased one \$1000 bond No. M5344308E.

On June 26, 1943 he purchased one \$1000 bond No. M1515836G.

On July 21, 1943 he purchased eight \$1000 bonds Nos. M163202010G to '13 and M 1632015G to '17, and M1632061G.

(Testimony of J. Bryant Eustice.)

On September 2, 1943 he purchased two \$5000 bonds, Nos. V264323G and '24.

On 9-2-43, four \$1000 bonds, Nos M1617636G to '39.

On September 15, 1943, three \$100 bonds, Nos. C44563337E to '39.

On September 29, 1943 one \$1000 bonds, No. 2031593G.

On December 14, 1943, five \$1000 bonds, Nos. M2129438G to '42.

That makes a total of \$51,475 at cost. [536]

Q. All right. Did you check against the bank accounts both of Mr. Ormont and of the Acme Meat Company, to determine whether any of the money that was used to purchase any of these bonds may have come from either of those accounts, from his bank accounts or the Acme Meat Company account?

A. Yes, some of the funds came from the Acme Meat Company; some came from his personal bank accounts.

Q. Can you give dates and items that you determined, in your mind, were the checks, or the withdrawals, from the bank accounts of the money that went into any of those bonds? A. Yes, sir.

Q. All right, if you will do that, please.

A. On the bonds purchased January 18th, 1943, \$7000 was paid for, \$5000 by check 336, from the Acme Meat Company. The source of the other \$2000 was unexplained.

The Court: You mean you couldn't trace it?

(Testimony of J. Bryant Eustice.)

The Witness: I couldn't trace it, or it was not explained to me by the taxpayer, or defendant. There were no book records, of course, on those items.

Q. (By Mr. Robnett): As to the \$5,000, the reason you say that that went into it, was that the check was made payable to the seller of the bonds, or was that check made payable to someone else, the \$5000 Acme Meat Company check?

A. I would say that I have an answer, or have a record [537] here. It was a withdrawal, on January 8, 1943, from the business.

Q. From what?

A. From his business account.

The Court: Do you mean from the Acme Meat Company?

The Witness: From the Acme Meat Company, yes.

Q. Who was the check payable to?

A. The check apparently was either cashed, or he may have received a cashier's check. We can't always tell by looking at the check, just what happens to it.

Q. Who was it payable to?

A. Your Honor, I don't have a record here on it. It must have been payable to cash, or to himself.

Q. You don't know?

A. Because he cashed the check at the bank. I have a notation in my work paper that the check was cashed at the Bank of America, Brooklyn.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): The next purchase that was made of bonds?

The Court: That was the \$7000 purchase?

Mr. Robnett: Yes.

A. \$7000; in other words, it was made around those dates, and he drew \$5000. It could have been used for the purchase of that particular bond.

The Court: It could have been used for that?

The Witness: It could have been used for that, so it was not taken into income.

Q. (By Mr. Robnett): Did you examine the books of the Acme Meat Company in connection with that alleged \$5000 check?

A. Yes, I examined that; it was charged to the defendant's capital account.

The Court: Did you see the check?

The Witness: It was charged on the books of the Acme. Yes, your Honor, I saw the check.

Q. (By Mr. Robnett): It was charged to his capital account? A. That is correct.

Q. Take up the next one that you have described, and tell us where the funds came from, as you calculated it, for that purchase.

A. I calculated the next one, it was drawn February 15, 1943, as coming from——

The Court: What does that total?

The Witness: \$750, as unexplained funds.

The Court: You couldn't trace it?

The Witness: That's right, and the taxpayer couldn't explain it.

The Court: Are they bonds in the name of Kosdon?

(Testimony of J. Bryant Eustice.)

The Witness: No, this was in the name of Samuel Ormont [539] and Mrs. Dora Goldberg.

Q. (By Mr. Robnett): So you charged that up as Mr. Ormont's? A. As additional income.

Q. Yes. Notwithstanding your record did show that there was another name as owner of the bond, with Mr. Sam Ormont? A. That's correct.

Q. And you did not have anything that showed anything from Sam Ormont as having been used to pay for it, isn't that correct?

A. That is correct, yes, sir.

Q. The next one?

A. The next was a thousand dollar bond purchased February 17, 1943. This was a bond that was in the name of Sam Ormont, or Sue Kosdon. That was a check drawn on the defendant's commercial bank account at the Security First National Bank in Huntington Park, dated 2-1-43.

Q. How much was the check? A. \$750.

Q. I thought you said that was a thousand dollar bond.

A. That was the face value of the bond, and the cost is \$750.

Q. I want the amount of cost. You say that check that you claim was the check that was paid for that bond, was dated [540] February 1st, 1943?

A. Yes, sir, the check was made payable to Benjamin Kosdon. I questioned the defendant on this. He stated that that was for the purchase of a bond, which ties in with the date. The only bond purchased around that date was on February 17, 1943.

(Testimony of J. Bryant Eustice.)

I couldn't be sure that it was, but he stated that it was, so I didn't take it into income.

Q. The defendant stated to you that that was for the purchase of this bond or a bond?

A. The purchase of a bond.

Q. Didn't he also, in that same statement, tell you that that was a loan to Benjamin Kosdon, or to Benjamin Kosdon and his wife Sus Kosdon?

A. He may have. At one time, I notice I have the word "Loan" written down on my work papers here. But I find there, apparently from subsequent conversations, I have changed that and considered it as a payment on this bond. In either case, it would not have been taken into income, and was not taken into income.

Mr. Robnett: I move to strike out what the witness says apparently by subsequent conversations.

Mr. Strong: I will agree to those words going out.

The Court: Strike. When you say it was not taken into account, you took them all into account, didn't you?

The Witness: No, only—that is, I considered as income, [541] only the items that came from unexplained sources; with checks drawn on the Acme Meat Company, or on the taxpayer's personal bank account, that part of the payments was not taken into income, but where I couldn't trace the source of the funds, and they could not be explained by the taxpayer, I considered it as cash from unexplained sources, and took that amount into income.

(Testimony of J. Bryant Eustice.)

So some of these cases, I might explain further, that they could not be definitely identified, like this \$5000 item. It's another case of not stating that the \$5000 bond, or the \$7000 represented income, but I gave the taxpayer the benefit of the doubt, as the \$5000 could have been used for the purchase of this bond, or the bond could have been purchased with this \$5000.

Q. (By Mr. Robnett): Let me understand. Did you not, in 1943, do as you did in 1942—compute and use what you call the comparative statement of net worth? A. That is correct.

Q. And in connection with that take into consideration all of these bonds that you have already described as having been purchased, according to your claim, by the defendant in 1943, and aggregating the sum of \$51,475?

A. The only part of that item that was taken into consideration as income was \$14,084.76. The other part of it [542] represented, although it shows a net worth payment as an increase in United States Government Bonds, it is also represented as a decrease in the taxpayer's bank account. One offsets the other. [543]

Q. Therefore you claim that he could not or did not change, or particularly did not increase, the assets of the defendant as you set them forth in your statement for 1943?

A. It increased it as far as taxable income was concerned to the extent of \$14,084.76.

(Testimony of J. Bryant Eustice.)

Q. This particular bond purchased here which you say was \$750, did that in any particular increase the alleged assets of the defendant as per your statement of 1943?

A. Can I have the question again?

(The question referred to was read by the reporter as set forth above.)

The Witness: It increased his assets as to Government bonds and decreased his bank account by exactly the same amount. No net increase in his net worth.

Q. (By Mr. Robnett): Did it in any way change the taxable income for the defendant for the year 1943?

A. In no way whatever.

Q. If, as a matter of fact, that bond was not, the defendant's bond, if it was not his bond then would that fact not change the statement as to his net assets or his increase of assets?

A. No, sir. If he loaned the money to Mrs. Kosdon it would show up on the net worth statement as a loan instead of as a Government bond, exactly the same effect. [544]

The Court: Suppose that that wasn't his money, that it was somebody else's money that bought it.

The Witness: If it was somebody else's money that bought the bond——

The Court: Suppose it was Sue Kosdon's money, the name on the bond, suppose she bought the bond and put his name on it, then you wouldn't have that \$51,475 increase in bonds, would you?

(Testimony of J. Bryant Eustice.)

The Witness: No, but we would have had the defendant writing a check for \$750 which would have to be accounted for in some other manner.

The Court: Suppose he bet it on the horses, it wouldn't make any difference.

The Witness: On his net worth statement it would be added to his personal expenses and increased his personal expenses.

The Court: It wouldn't increase his income, would it?

The Witness: It wouldn't increase his income; it didn't increase his income in any way.

The Court: But if it belonged to somebody else and you added \$750 worth of bonds in here that actually were bought by somebody else that would decrease his income, wouldn't it?

The Witness: I am just trying to see if I understand the question, your Honor.

The Court: Suppose you added \$1000 worth of my bonds [545] in here and you shouldn't have done it, wouldn't that increase his income?

The Witness: I didn't compute his income by the net worth statement. I only used the net worth statement to prove the income that I had previously computed, and of course if there was some other transaction that took place here, well I would have to take it into account in some other way.

The Court: If the bonds belonged to somebody else, why then this would have been your net worth or your net taxable income that you show here, but it would be reduced by the amount of bonds, wouldn't it?

(Testimony of J. Bryant Eustice.)

The Witness: If it belonged to somebody else I would reduce the taxpayer's Government bonds by \$750. But then if the \$750 was for a loan I would add the \$750 in place of that.

The Court: Forget the \$750. Just if you put a bond in there that didn't belong to him.

The Witness: If I had any bonds in here that didn't belong to him it would reduce that figure.

The Court: And also reduce what you assert to be the net taxable income?

The Witness: It would change this statement which I used to prove this net taxable income. That is, my computation of it.

The Court: All right.

The Witness: That is, the net worth statement is simply [545] a proof of the computations that I had made by tracing income from unknown sources or that could not be explained by the defendant.

Q. (By Mr. Robnett): And if that net worth statement were different than it is, if you took off of there, in other words, \$750 off of bonds because the bond belonged to someone else and was purchased by somebody else with their own money, then it would change this statement, wouldn't it, and it wouldn't prove your other calculations as to income?

A. You understand that in handling this particular item I asked the taxpayer——

Q. Do you understand the question?

The Court: Don't argue the question, Mr. Witness. You try and answer the question. Mr.

(Testimony of J. Bryant Eustice.)

Strong at the appropriate time will make the argument.

The Witness: I will try to answer it even though it probably doesn't properly explain the question.

The Court: That is up to the lawyer to argue his case to the jury. The witness doesn't have to.

Q. (By Mr. Robnett): In order to prove your contention of the income of the defendant, you used, you say, this comparative statement of net worth? A. Yes, sir. [547]

Q. Now in using that as proof, did you accept it as proof if it varied from what you contended was the income, or did you accept it as proof if it compared with the net income that you contended?

A. It actually compared with the net income that I computed.

Q. Yes.

The Court: Taking all your other assumptions as correct? In other words, to do that you have to assume, for instance, that the \$750 was either a loan or spent in personal living or something else?

The Witness: I didn't make an assumption, your Honor, on that. It was what the taxpayer told me. He told me this money was used to buy a bond. He told me that all of these bonds belonged to him. I have no other method then of determining or making my computations. If it is a different condition I will be glad to admit any effect that it may have had on his income.

Q. (By Mr. Robnett): I am trying to find out if it wouldn't really disprove your calculations if,

(Testimony of J. Bryant Eustice.)

as a matter of fact, a bond that had cost \$750 and which you have in your net statement here as belonging to Mr. Ormont never belonged to him and he never paid for it, isn't it a fact that that would affect the proof of your income? [548]

A. No, sir.

Q. It wouldn't bother it at all?

A. No, I still have the \$750 to account for some place or other. If it doesn't belong as a purchase of a bond then it belongs some place else. It wasn't what the taxpayer told me he used the money for some other place, and until I know what he used the money for I don't know where to place it on his net worth statement.

Q. That particular money, did it come out of his personal account or the Acme Meat Company?

A. It came out of his personal account.

Q. And you didn't try to trace it any further than after he told you what it was used for?

A. That is correct. It was not taken into income. He drew \$750, he purchased a bond around the same date, so I didn't take it into income but I assumed he could have used that \$750 to purchase a bond.

Q. Then there you used his statement as to what was done with that money, didn't you, in making your calculations?

A. In this instance, yes, sir, with evidence of a check that was actually drawn on that date.

The Court: Who did you say the check was drawn to?

(Testimony of J. Bryant Eustice.)

The Witness: Benjamin Kosdon, I believe.

Q. (By Mr. Robnett): And it was drawn, was it not, on February 1, 1943? [549]

A. Yes, sir.

Q. Now as to some of the other bonds, isn't it a fact that you were told by Mr. Ormont that some of those bonds were purchased with money that belonged to his mother?

A. I don't recall that Mr. Ormont ever told me that; no, sir.

Q. He never told you that at all?

A. No, sir. He would hardly do that considering that he claimed his mother as a dependent on the income tax return.

Q. All right. Well, then, we will take the rest of the items and you will proceed with them, please, as to which ones you charge up as being income, taking each bond. Let's find out what you charged it as.

A. You want a continuation?

Q. Yes. The last one was February 17, \$1000, for which \$750 was the purchase price.

A. On April 12, 1943 he purchased another bond for \$1000, unexplained funds.

Q. Are you giving the cost of the bond this time or are you giving the face of the bond?

A. This is the cost of the bond. It is a G bond.

Q. All right.

A. This item was taken into income.

Q. That was April 12th, was it?

A. Yes, sir. [550]

(Testimony of J. Bryant Eustice.)

Q. What is the next one?

A. April 22 he purchased another G bond, cost of \$1000, unexplained funds.

The Court: You mean you couldn't trace the funds?

The Witness: That is correct, your Honor. I could account for all of these funds and none of them were used for this purpose.

Q. (By Mr. Robnett): That last item was April 22nd or May 22nd? A. April 22nd.

Q. That is the way you have it on your records?

A. Yes, sir.

Q. Who does it show purchased that bond?

A. The bonds were purchased at the Federal Reserve Bank at San Francisco, or issued by the Federal Reserve Bank in San Francisco. The bonds are in the name of Sam Ormont or Mrs. Dora Goldberg.

Q. It does not show who did the purchasing, aside from that, does it?

A. No, sir. I would hardly have any way of determining that.

Q. You say that was furnished from the Federal Reserve Bank in San Francisco?

A. Yes, it was issued by the Federal Reserve Bank of San Francisco. [551]

Q. That was a Series G bond?

A. It was a Series G bond; yes.

Q. Will you look there again and see if on May 22, 1943 you have the purchase of any bond by Dora Goldberg? A. May 22nd?

(Testimony of J. Bryant Eustice.)

Q. Yes.

A. I believe there were some bonds purchased on the list that was given to me. I will see if I have a record of them here. They weren't taken into account as income of the taxpayer.

Mr. Strong: Here is another list, your Honor. May the witness have it?

The Court: Is that part of your exhibit?

Mr. Strong: That is No. 42.

(The document referred to was passed to the witness.)

The Witness: I don't seem to find any.

Q. (By Mr. Robnett): You don't find any other or any bond at all in the name of Dora Goldberg that is dated on or about May 22, 1943?

A. No, I do not.

Q. Now you do find on the ones that you used in figuring Mr. Ormont's income tax for '43, you do find that is on your paper and under the date of April 22, 1943, don't you?

A. I have a bond here, April 25, 1943.

Q. You testified a while ago about one—— [552]

A. I beg your pardon. That is correct, April 22nd.

Q. You did not make that list that you have before you, did you? I understood you didn't.

A. I copied this from the other list that was presented to me by Mr. Phoebus.

Q. And you of course do not know whether that date could be wrong or not?

(Testimony of J. Bryant Eustice.)

Mr. Strong: May we have that list identified? It has a number, your Honor.

The Court: What list are you looking at?

The Witness: (Exhibiting document.)

Mr. Strong: No. 42.

Mr. Robnett: I would like to have this marked as an exhibit next in order.

The Clerk: Q.

(The document referred to was marked Defendants' Exhibit Q for identification.)

Q. (By Mr. Robnett): On the bond as shown in your list of April 22, 1943 the names on that as you have it are Dora Goldberg as well as Sam Ormont?

A. Sam Ormont of Mrs. Dora Goldberg is the way I have it.

Q. That is a Series G bond that was purchased from the Federal Reserve Bank at San Francisco?

A. That is correct.

Q. I show you Exhibit Q, which is a customer's copy, I believe—it is very faint, the lead pencil writing on it. A. It is indeed.

Q. And you will note here it looks like a 5-22-43, doesn't it? A. Yes, sir.

Q. And the signature of the purchaser is Dora Goldberg there, isn't it? A. Yes, sir.

Q. That is for \$1000 bond of Series G, isn't it?

A. I can't read it.

Q. Well, there is a figure here in front of the item, isn't there?

A. It could very well be here but I can't distinguish it.

(Testimony of J. Bryant Eustice.)

Q. That states at the top that it is an application for a United States war savings bond, Series G, 12-year interest bearing bond, to Federal Reserve Bank of San Francisco, San Francisco, California, doesn't it? A. That is correct.

Mr. Robnett: I am going to offer this in evidence, if the Court please.

Mr. Strong: No objection.

The Court: Admitted. [554]

(The document referred to was received in evidence and marked Defendants' Exhibit Q).

Q. The memorandum receipt, is that not dated 5-22-43? Is that correct? Apparently that is the date. A. It looks like 5-22-43.

Q. And doesn't show the signature of the person receipting for it as Sue Kosdon?

A. It looks like the name Sue Kosdon on there. I can read part of it.

The Court: And across it is: Delivered to 4 something Cornwall Street?

A. That's the defendant's address.

Q. Cornwall Street?

A. I believe that is, as shown on the income tax return.

Q. And also Dora Goldberg's address?

A. 407 North Cornwall Street.

Q. That is also Dora Goldberg's address?

A. Yes, your Honor.

Q. Is that Sue Kosdon's address, do you know?

A. That is Sue Kosdon's husband standing up there.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: No, it isn't your Honor.

The Court: Sue Kosdon, do you know if she is any relationship to the defendant?

The Witness: I understand she is a sister of the defendant.

The Court: By the way, the jury is instructed to disregard the remark made by the witness a short time ago, when [556] counsel asked him if he had ever had a conversation with the defendant, and he said his mother bought the bonds, and he said he hardly would have claimed that, because he claims her as his dependent;—the jury is instructed that that statement is purely speculative on the part of the witness, and is a conclusion as to what the law is or is not, and that is not for him to decide, and has no place in this case.

Mr. Robnett: I move that it be stricken.

The Court: It is already stricken. I struck it on my own motion.

Q. (By Mr. Robnett): Let us proceed now to the next bond.

A. The next bond was purchased on May 5, 1943, 10 \$1000 bonds, G bonds; cost \$10,000, were purchased by check drawn by the taxpayer on his commercial account at the Security First National Bank, for \$8,147.73, and cash of \$1852.27. The \$8,147.73 was not considered as income in my report. The \$1852.27 cash used was considered as income, unexplained funds.

The Court: I do not understand your statement. You say he bought \$10,000 worth of bonds?

The Witness: Yes, your Honor.

(Testimony of J. Bryant Eustice.)

The Court: And used \$16,000 to buy them?

The Witness: No, a check on his commercial account for \$8,147.73, and cash of \$1852.27.

The Court: Cash \$1852.27? [557]

The Witness: Yes.

The Court: I thought you said \$8,000 cash. What name were they in?

The Witness: The name of Sam Ormont or Mrs. Dora Goldberg.

Q. (By Mr. Robnett): What is your next purchase?

A. On January 5, 1943, he purchased one \$1000 bond, which I considered as unexplained funds. It was not traceable to any known source.

Q. What was the cost of that? A. \$1000.

Q. You did not trace out any check or checks for that? A. That is correct.

Q. And merely because you could not so trace it you charged it up to him? A. No, sir.

Q. How is that? A. The answer is no.

Q. What other reason did you have?

A. On January 1st, 1943 the taxpayer had \$24,-024.62 in his personal bank accounts. The taxpayer drew \$12,296.03 from the Acme Meat Company. Of this, he purchased \$12,042.82. He deposited that in his personal bank accounts. He had left, presumably for personal expenses, \$253.21. He received a check for interest on Government bonds of \$387.50. He [558] deposited \$125 in his bank account. He had cashed the checks, \$262.50. He received interest

(Testimony of J. Bryant Eustice.)

checks from Sam and Ben Borne of \$105, which he deposited in his bank account; interest on savings account——

The Court: All that was the reason why this check is unexplained?

A. Yes, the reason is, I have accounted for all of his funds in 1943. In addition to that he had these other funds.

Q. The question was whether or not you put that to income because you could not trace the source.

A. He adds, your Honor: Just for no other reason?

The Court: Just——

The Witness: I think if you will read the question: For no other reason.

The Court: I think he said simply.

The Witness: Simply for no other reason. This was the reason I was giving here as a fact, I was able to account for all of his funds from known sources. In addition to that——

The Court: You are unable to account for that?

The Witness: Yes, he had this other money that went into these bonds.

Q. (By Mr. Robnett): When you say you were able to account for all of his money from known sources——

A. Yes, sir. [559]

Q. You knew, did you not, and were told by the defendant that he had currency, and had had for years; that he did have every year?

A. I found no evidence of it.

Mr. Robnett: I move to strike the answer as not responsive.

(Testimony of J. Bryant Eustice.)

The Court: It may be stricken.

Mr. Robnett: Please read the question. I would like a yes or no answer.

Mr. Strong: I submit——

The Court: It is a compound question.

Mr. Robnett: I will change the question.

Q. You had been told by the defendant that he had currency and money, aside from that deposited in banks, and had had cash throughout the years?

A. That's what he told me.

The Court: I think it is a good time to take a recess. Remember the admonition.

(Short recess.) [560]

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Kosdon: So stipulated.

The Court: Proceed.

Q. (By Mr. Robnett): Although the defendant had told you that he always had currency or cash, in your entire calculations you never at any time gave any consideration to that statement or counted that any of the funds which you charged as unaccounted income could have come from that cash or currency he had on hand, did you?

A. No, sir.

Q. Now we will take the next bond, please. The last one that I have was June 5, 1943, \$1,000.

A. On June 25, 1943, another bond was purchased, cost of \$750, which I considered from unexplained funds.

(Testimony of J. Bryant Eustice.)

Q. All of it? A. All of it.

Q. And you charged up in your calculations with that sum of \$750 as taxable income?

A. As taxable income.

Q. All right. Proceed.

A. On June 26, 1943, another \$1,000 bond, cost \$1,000, issued by the Federal Reserve Bank of San Francisco, which was [561] also considered purchased with explained funds.

Q. And charged as unaccounted taxable income?

A. Taken into account as income.

Q. And that bond was likewise in the name of Dora Goldberg as well as Sam Ormont?

A. That is correct.

Q. All right.

A. On July 21 he purchased eight \$1,000 bonds, and the cost was \$8,000.

Q. How much?

A. \$8,000. \$5,992.51 of the purchase price came from the defendant's savings account No. 224-808 at the Security-First National Bank. That was the balance in the account and closed the account. And that amount was not taken into income. The additional amount of \$207.49 was paid in cash and that was taken into account as income, unexplained funds.

Q. That made what price for those eight bonds?

A. That was the price, \$8,000.

The Court: How much was the check?

The Witness: \$5,992.51.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): And the other item of cash? A. \$2,007.49.

Q. I understood you to say \$207.

The Court: So did I. [562]

Q. (By Mr. Robnett:) All right. What is the next item?

A. On September 2nd he purchased bonds, the total amount of \$14,000. \$12,500 was drawn from his savings account at the Bank of America No. 747. This much of the purchase price was not taken into account as income. The balance of \$1500 was considered as income from unexplained funds.

Q. The next one.

A. On September 15, 1943, he purchased three bonds which cost \$225, which was considered as having come from, the cost as having come from, unexplained funds.

Q. The amount was \$225? A. \$225.

Q. All right. What is the next one?

A. On September 29, 1943, he purchased another bond for \$1,000 which was considered as purchased from unexplained funds.

Q. Each time you say that they were considered as unexplained funds, you mean that you charged them up against the defendant Sam Ormont as taxable income in your calculations?

A. That is correct.

Q. Is that all of them?

A. No. On December 14, 1943, he purchased five bonds for a total cost of \$5,000. This was money drawn from his commercial account at the Security-

(Testimony of J. Bryant Eustice.)

First National Bank at Huntington [563] Park.
This item was not taken into income.

Q. Pardon me. I don't seem to get these dates consecutively. Hadn't you already testified as to the \$225, that that was December 15?

A. September 15.

Q. And then the next date of a \$1,000 bond was the 29th of some month?

A. Of September also.

Q. September? A. Yes.

Q. And this last one was dated what?

A. December. [564]

Q. Proceed.

A. That was all the bonds that I have a record of, purchased in 1943.

Q. Now, you have figured out the aggregate, have you not, of the items that you have heretofore testified to, which you call unexplained funds in the purchase of these bonds, and have that item somewhere, haven't you?

A. Yes, sir. U. S. Government bonds that were purchased during 1943, \$51,475.

The Court: I think he means the item that you referred to as being fourteen thousand dollars, or something like that; the difference between the amount of money which you could trace, which went into the purchase of bonds, and the amount of money that you could not trace?

The Witness: That is correct. That item was \$14,084.76.

The Court: \$14,084.76?

The Witness: That is correct.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): The total of the amount that you traced the funds of, as you say, from the purchase of the bonds for 1943, was \$37,390.24?

A. That is correct.

Q. All right. Wasn't that \$14,084.76, which you claim should have been accounted for in 1943, and added to what Mr. Ormont actually accounted for, that makes up the total amount [565] you claim should have been accounted for?

A. That is part of the adjustment of \$18,109.30. That's one item of it.

Q. Eighteen thousand how much?

A. —109.30.

Q. You have \$4,024.54 in addition to that in other items, have you? A. It must have been.

Q. Other items were involved?

A. Other items, yes.

Q. Let us take up those items. Will you give them to me, as to what they were, according to your report?

A. Cash from undisclosed sources, deposited to the taxpayer's personal bank account as cash, in addition to cash used for the purchase of bonds.

Q. How much? A. \$1675.

Q. Was that all in one deposit?

A. No, sir.

Q. It was made up of various items?

A. Made up of various items.

Q. Will you give me the items and the dates, please?

(Testimony of J. Bryant Eustice.)

A. Deposited, February 19, 1943, \$275 cash. Would you like the total deposit on that date, included in the item?

Q. Have you the deposit slip there before you?

A. No, I have not.

Q. Have you seen it here? A. It's here.

Q. That's on what bank?

A. Security First National Bank, commercial account, Huntington Park.

Q. Have you found the deposit slip?

A. This is it.

Q. Part of Exhibit 14. And you are showing me deposit slip dated 2-19-43, is that correct?

A. 2-19-43.

Q. All right. You say cash. You have testified that there was cash that you had charged to him that was deposited on that day, of \$275, haven't you? A. That is correct.

Q. And there is another item of deposit on that date of \$500, isn't there? A. Yes, a check.

Q. I ask you if, as a matter of fact, the first item that you told me was currency or cash—if it wasn't a check, and that the clearing house number on the check was 90.903?

A. It appears to be, yes, sir.

Q. And it was not cash, was it? It was a check?

A. Apparently so, from the deposit slip. [567]

Q. All right. Did you try to trace that check out?

A. Apparently not because it was taken into account as cash. I took it into account as cash.

(Testimony of J. Bryant Eustice.)

Q. You never tried to trace the check?

A. No.

Q. Because you had it down as cash, is that correct?

A. That is correct; yes.

Q. Who made that report that you have before you that says cash or currency?

A. I made the report.

Q. You made that yourself, didn't you?

A. Yes, sir. I made that at the bank.

Q. What did you have before you when you did it?

A. The deposit slips.

Q. And the identical one I have just shown you and that I have called your attention to that was a check, that is the one you examined, isn't it?

A. This deposit slip that you showed me here; yes, sir.

The Court: How do you account for the error?

The Witness: Well, it might be accounted, your Honor, in this respect, that I might have made the error myself in taking it off, in having it called by the bank clerk getting these items out of the box and going through them, he may have called it to me as cash and I didn't catch it as not having been cash. [568]

The Court: Didn't you examine the deposit slip yourself or did you leave that to a bank clerk to call them off?

The Witness: He usually handed them to me and I would look at them. Sometimes he would call the amounts of what it was.

The Court: That would reduce that figure by that amount?

(Testimony of J. Bryant Eustice.)

The Witness: That would reduce it by \$275, that is, if it is a check from the Acme Meat Company, which it may have been a check from the Acme Meat Company.

Q. (By Mr. Robnett): Now let's find out what the items are that are embraced in the \$1400 that is remaining.

A. Then on June 5, 1943, there was a deposit of \$442.82.

Q. That is in the same bank? A. Yes, sir.

Q. That would be in Exhibit 14 also, would it not? Will you show me that deposit slip?

A. (Examining exhibit)

Q. By the way, how do you have that, is any of that cash? A. \$300.

Q. \$300 of it was cash as you have it?

A. Yes.

Q. The date you gave is June 5, 1943.

A. The deposit slip isn't here. [569]

Q. It isn't there? A. Not in this group.

The Court: Do we have any others, Mr. Clerk?

Mr. Robnett: What branch was it of the Security-First National Bank, do you remember? Was it the Huntington Park Branch?

The Witness: The Huntington Park branch; yes.

The Court: Give him all the bank slips and let him look them over.

(The exhibits referred to were passed to the witness.)

Q. (By Mr. Robnett): I am giving you Exhibit 14, 23 and 24—23 seems to be on the Citizens Bank

(Testimony of J. Bryant Eustice.)

—14 and 24 are both on the Security-First National Bank, Huntington Park Branch. Will you look at those and see if either of those contain the deposit slip.

A. (Examining exhibits.)

The Court: Did you find it?

The Witness: No, your Honor. It is not in any of these.

The Court: The testimony of the officer of the Security-First National Bank was that that was all of the deposit slips.

Mr. Strong: That is what I thought he said.

The Witness: I believe he brought the bank statements. That will indicate whether there was a deposit for that amount [570] on that date.

The Court: He was requested to bring all bank slips and deposit slips. Could you have been in error about the bank?

The Witness: No. This is all in the same transcript, the analysis that I have here, on the same page after the other. The bank statement will indicate whether or not there was a deposit for that amount actually made on that date.

Mr. Robnett: No there was not. There was a deposit of \$444.82 made on that date, which is \$2 different from the figure you gave.

Mr. Strong: May the witness see the bank statements which are in evidence?

Mr. Robnett: Yes. This is Exhibit 15.

(The document referred to was passed to the witness.) [571]

(Testimony of J. Bryant Eustice.)

A. The bank statement says \$444.82.

Q. You have it in your notes as \$442, haven't you? A. \$442.82.

A. But there is no deposit slip here for that deposit, is there; I mean, in any of these exhibits?

A. No.

The Court: Did you see any deposit slip at the bank?

The Witness: Yes, your Honor, I saw the deposit slip, and that there was an item of cash and a check deposited on that slip. The \$142.82. \$300 was cash, and was a withdrawal from the Acme Meat Company.

Q. (By Mr. Robnett): That's according to your records? A. According to my records.

Q. Is that the only record, or complete record of that deposit that you have—\$300 cash, you say?

A. Yes, \$300 cash.

Q. And \$142.82? A. \$142.82, yes.

Q. Acme Meat Company's check?

A. Acme Meat Company's check.

Q. You have no memorandum of the other \$2, as to what that was, as shown on the bank ledger?

A. Just a minute, please. If there was another \$2—no, I haven't any record on it. [572]

Q. The bank ledger is right there before you?

A. I would like to see the deposit slip.

Q. I would very much like to see it.

A. Before I answer that.

Q. It isn't here, apparently. Look at the bank record there. I believe it is 15. I think you have

(Testimony of J. Bryant Eustice.)

it there, haven't you, the ledger sheets of that? What does that show as to the amount of the deposit on June 5? A. \$444.82.

Q. Yes. Without the deposit slip I can't complete the examination on that matter. I don't know whether we can get one. If there is one, we would like to get it.

The Court: What do you want, a subpoena?

Mr. Robnett: I think we can do it by telephone over the week end, your Honor, and have it here Monday. I just want you to know I was not completing this.

Q. What is the next item? That would be \$300 you are claiming, of the \$1,400 there, isn't it?

A. That is correct.

Q. That leaves \$1,100 then to account for. Will you kindly tell me what that is made up of?

A. That's a deposit on September 4th, of \$800.

Q. What month? I understand you to say December. A. September.

Q. September 4? [573] A. 1943.

Q. I understand we are talking entirely about 1943 now? A. Yes.

Q. What do your records show as to that?

A. \$800 in currency.

Q. \$800? A. In currency.

Q. Is that the total deposit?

A. That is the total deposit.

Q. That entire amount you are charging, of that \$1100 balance as unexplained?

A. Yes, the \$300 and the \$800.

(Testimony of J. Bryant Eustice.)

Q. That September 4. Have you the deposit slips before you?

A. The same condition exists here, apparently. There is no deposit slip here for September 4, '43, though the item of \$800 shows on the bank statement.

Q. It does show? A. Yes.

Q. It shows a deposit of \$800; it does not show currency, of course? A. Of course not.

Q. We would like to finish that up if we can get the deposit slip. Would you proceed to the next item? That would leave \$300 more, would it not, under your claim? [574]

A. There is a deposit on March 20, 1943.

Q. March? A. March 20.

Q. You are going backward?

A. It's a different account.

Q. It's a different bank? A. Yes, sir.

Q. March 20? What bank is this?

A. This is the defendant's savings account No. 747 at the Bank of America, Brooklyn and Soto. A deposit for a total amount of \$400.

Q. There was \$400 deposited?

A. Yes, sir.

Q. How does your record show that as broken up?

A. Three checks from the Acme Meat Company of \$100 each, and \$100 currency. [575]

Q. There are three checks of 100 each, making \$300 of the \$400 and the balance of the 100 was what? A. Currency.

(Testimony of J. Bryant Eustice.)

Q. It is the \$100 currency that I take it you are claiming was income? A. That is correct.

Q. Is there a deposit slip there with that bank?

A. Could I have the deposit slips for the Bank of America?

The Court: Give him all the deposit slips.

(The documents referred to were passed to the witness.)

The Witness: I have the deposit slip.

Mr. Robnett: All right. May I see it?

Q. That is in Exhibit 37, isn't it?

A. That is correct.

Q. Under date of March 20, 1943, and it shows a deposit, the first item that is show is a deposit of coin, isn't it, \$100?

A. Well, cash or coin. It most likely belongs up on the other line.

Q. Isn't it on that line?

A. Where it says coin, yes.

Q. And it is \$100, and then there are three checks of \$100 each all bearing the number 90-903?

A. Yes, sir. [576]

Q. That is the clearing house number?

A. Yes, that is correct.

Q. And making a total of \$400? A. Yes.

Q. Now that, as I figure it, leaves to be accounted for the sum of \$200 of the amount that you claim was unreported as income?

A. That is correct. There is another deposit on the same bank on April 3rd.

Q. April 3rd of 1943? A. 1943.

(Testimony of J. Bryant Eustice.)

Q. What was the total deposit, according to your records? A. \$502.54.

Q. How was that broken up?

A. There is \$200 cash, two \$100 checks drawn on 90-903 and another check for \$102.54 drawn on 16-322.

Q. I hand you Exhibit 37 again. Will you find the deposit slip in that, please?

A. (Producing document.)

Q. That is the last slip on the exhibit, isn't it?

A. That is correct.

Q. And that is dated 4-3-1943?

A. That is correct.

Q. The first item shows currency \$200? [577]

A. Yes.

Q. Then there is a check bearing a clearing house number 90-903, \$100; the next check, the same clearing house number, \$100; and the last one bearing the clearing house number 16-322, \$102.54, making the total \$502.54? A. That is correct.

Q. That is the additional \$200 that you have claimed should have been reported as income in 1943?

A. That is as additional cash. I have also taken this other check of \$102.54 into income as unidentified checks, unexplained checks.

Q. Oh, you took the \$200 cash, the total of that, and then you took the \$102.54?

A. That is a separate item on my analysis here.

Q. How much was that \$102 check?

A. \$102.54.

(Testimony of J. Bryant Eustice.)

Q. Did you trace that check?

A. Yes, I did.

Q. What did you find? Whose check was it, if you could tell?

A. It was a check issued by E. A. Kaplan.

Q. And what was that bank, do you know, 16-322?

A. The Bank of America, Wabash and Evergreen.

Q. Did you see the maker of that check?

A. Mr. Kaplan, yes; I saw Mr. Kaplan. [578]

Q. You saw him? A. Yes.

Q. Where does he live?

A. 3941 Rogers Street, Los Angeles. He is a meat dealer. That is, he had a market at 1121 City Terrace. That was his check No. 765 which he charged to purchases.

Mr. Robnett: Thank you very much.

Now, your Honor please, this is the day before a holiday and I wondered if we might adjourn a few minutes earlier and let's see if we couldn't get the rest of that bank record by Monday afternoon.

The Court: I thought it being the day before a holiday we might work a little longer.

Mr. Robnett: I did want to complete this matter while it is all together, if it is agreeable. Of course, if the court wants to go on, I will have to start in with a new subject.

The Court: I am agreeable.

I think perhaps we might as well recess until Tuesday morning and give the lawyers Monday afternoon to catch up with their other business. Recess until Tuesday morning at 10:00 o'clock.

Remember the admonition.

(Whereupon, at 4:25 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Tuesday, June 3, 1947.) [579]

Los Angeles, California, Tuesday, June 3, 1947,
10:00 A.M.

The Court: United States vs. Ormont and Himmelfarb.

Mr. Strong: Ready.

Mr. Robnett: Ready.

The Court: The usual stipulation?

Mr. Strong: The usual stipulation.

Mr. Katz: So stipulated.

Mr. Robnett: Yes.

J. BRYANT EUSTICE

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Robnett:

Q. Mr. Eustice, when we took our last adjournment you had just testified about a check for \$102.54, made out to Mr. Ormont by Mr. Kaplan. Do you remember that?

(Testimony of J. Bryant Eustice.)

A. Yes. May I have Exhibit 40, and my work papers?

Q. Do you have any memorandum on Exhibit 40 or your notes of that transaction?

A. I have the information which I——

Q. Just a moment. Do you have a memorandum concerning it? A. Yes, I have here. [583]

Q. May I see it, please? This document, is this an exhibit in the case? A. Yes.

Q. Or is this one of your other notes?

A. It's the summary of what I have here.

Q. Do you have it in Exhibit 40—this transaction?

A. I may have some memoranda on it here. I have no index of all these papers. It may take time to find it. How much was the amount of that, again?

Q. \$102.54.

A. I have a notation here as to the number of the check, the amount, who it was issued by, where it was deposited.

Q. I will ask you, Mr. Eustice, if you did not talk to Mr. Kaplan, or trace that check out as to what it was issued for? Answer that question yes or no, please. A. Yes, I did.

Q. I will ask you if Mr. Kaplan didn't tell you that that was to reimburse Mr. Ormont for some merchandise Mr. Ormont had bought and paid for for Mr. Kaplan in that amount?

A. Not at that time, prior to my making this report.

(Testimony of J. Bryant Eustice.)

Q. Did he afterward tell you that?

A. He was subpoenaed as a Government witness, and came back in here during the trial. At that time, at Mr. Strong's request, I talked with him, and he was asked to [584] bring in his books and records so that we could have another look at this item, or trace that item, to find it on his books and records, and he did not bring the books and records indicating what disposition had been made of that check, as he stated.

Q. I am asking you if he stated what I have asked you? Did he state, in substance, at any time to you, that the \$102.54 check to Sam Ormont was to reimburse Mr. Ormont for merchandist Mr. Ormont had bought and paid for Mr. Kaplan?

A. Yes. I was trying to think what you said. That was what he stated, when he was in here.

Q. As you testified the other day, you had it charged against Mr. Ormont as income, is that correct? A. That is correct, yes.

Q. But, if, as Mr. Kaplan has now told you, that it was merely to reimburse Mr. Ormont for merchandise, then it would not be income, would it?

A. No, it would be a reduction then of the amount that I had charged, or considered as money used for personal expenses of Mr. Ormont.

Q. Wouldn't it be a reduction of what you have claimed was the amount of unreported income of Mr. Ormont?

The Court: You can answer that yes or no, Mr. Eustice.

A. The answer would be no.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Mr. Eustice, let me understand you. You remember [585] testifying the other day that you had charged it as income because it was unexplained? A. Yes, sir.

Q. Now according to your testimony this morning, from your explanation you received from Mr. Kaplan, it was merely a reimbursement of Mr. Ormont and therefore it would not have been income, would it? A. I was about to explain——

The Court: You can answer that. Wouldn't it reduce the amount that you claim he underpaid?

The Witness: Not necessarily, your Honor. If it is reflected as a reduction of the amount available for personal living expenses, then it becomes a question of——

The Court: Why do you say personal living expenses when it was given to the defendant here to repay him for something that he bought for this other man, if that is the case?

The Witness: Well, it would not be taken into income as unexplained deposits, but it becomes a reduction of the amount he had available for personal living expenses. Then the question becomes, is the amount that is shown for his personal living expenses correct or not. If they are correct then it indicates that the taxpayer must have used some of these unexplained funds for his personal living expenses. That item that is in the balance sheet as personal living expenses is not an item that can be substantiated although I have evidence that it was at least that amount that he paid for personal living expenses.

(Testimony of J. Bryant Eustice.)

The Court: I do not see the relationship between this [587] item and his personal living expenses. I cannot understand that. Did you take the \$102.54 into consideration as an increased amount of his income in your calculations?

The Witness: Yes, your Honor, I did.

The Court: Then if it was not the item or the purposes or uses which you thought, it would decrease the increased amount, wouldn't it, and if you increase it some other way that is something else?

The Witness: That is correct, your Honor.

The Court: Then this item standing alone, that would decrease it by that much?

The Witness: As income from unexplained checks; yes, your Honor.

The Court: The total income that you charge to him.

The Witness: Before I could say that it reduced the total income, I also included that income when he paid the money out as being a personal expense, although I also was in error there. It was not a personal expense and therefore it would reduce it.

The Court: It would reduce it by twice that amount, would it?

The Witness: No, by exactly that amount.

The Court: But it would reduce it by that amount?

The Witness: Yes, the amount that he had to use or was available for personal living expenses.

(Testimony of J. Bryant Eustice.)

If the amount that [588] I have shown as having been used and available for personal living expenses is correct, then it indicates that the taxpayer used some of the unexplained funds for that purpose.

The Court: I cannot possibly see what that has to do with it. In other words, you are trying to say that if this is reduced by that, then you can figure out a way to charge him with an equivalent amount some other way.

The Witness: I just don't figure it that way, your Honor.

The Court: That is your answer, every time you say yes, you reduce it, but his living expenses. Let us stick to one item. If counsel is correct in his statement and you are correct in your answer, in the assumptions, then you would reduce this total amount here, whatever it is—what sum is it?

Mr. Robnett: \$102.54.

The Court: No, the total, \$31,000 or something.

Mr. Robnett: \$18,000, I believe.

The Court: Whatever that sum is, it would reduce that total amount by that sum, and assuming all your other calculations are correct?

Mr. Strong: Your Honor, may I submit there are different sums here and unless he has a specific sum that is being referred to——

The Court: I do not know which one of these papers you are taking about now. Is this 1942 or 1943?

Mr. Strong: 1943, your Honor. [589]

Mr. Robnett: 1943.

(Testimony of J. Bryant Eustice.)

The Court: Summary of adjustments to income?

Mr. Strong: That is right.

The Court: The corrected amount you have there is \$30,512.86, is that correct?

The Witness: \$30,512.86; yes, your Honor.

The Court: Now in arriving at that figure, you added \$102.54 as part of the correct amount, didn't you?

The Witness: Yes, your Honor.

The Court: Now assume that all of your other calculations here were correct when you made this and that one was wrong, then it would be reduced by \$102.54?

The Witness: Yes, if we just leave out the calculations——

The Court: I say, assume all your other calculations are correct.

The Witness: I don't know whether, your Honor, I have made it clear or not, but every item that is taken into consideration on the income is also reflected some place on my net worth statement.

The Court: I am not talking about the net worth statement now; I am talking about your corrected income. In other words, if he had \$102.00 less income he would have \$102.00 less income.

The Witness: The question then arises, from a matter [590] of accounting, what item did it reflect or change on the computation of the taxpayer's net worth.

The Court: Go on, counsel. Proceed with your examination.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Now, Mr. Eustice, referring to your comparative statement of net worth for 1943, you have, have you not, under assets an item called "balance due from broker"?

A. Yes, sir.

Q. About the seventh or eighth item, I believe.

A. Yes, the second to the last.

Q. You have that item, don't you?

A. Yes, sir.

Q. And under January 1, '43 you have that item as \$4.20, is that right? A. Yes, sir.

Q. And at December 31, '43 you have \$2447.28?

A. Yes, sir.

Q. Now is it not a fact that you took the \$2447.28 into account as an income for that year?

A. No, sir, I did not.

Q. What did you do with it?

A. I didn't do anything with it except to include it in his assets at the end of the year 1943.

Q. You increased his assets to that extent, didn't you? [591]

A. Yes, on the net worth computation I showed that his assets were increased by \$2447—not increased by that, but that he had assets of \$2447.28 as a balance due from broker.

I also reduced the corporation's stocks by \$2037.60 because he sold those stocks and instead of having the asset as corporation stocks he had it as a balance due from broker.

(Testimony of J. Bryant Eustice.)

Q. But the differential between the \$2037.60 and \$2447.28 would reflect in your report as an income, wouldn't it?

A. Yes, he had a profit on the sale of those stocks.

Q. Now that broker transaction that you refer to here is the same transaction that you have heretofore referred to, is it not, and to the same exhibits—I will show you Exhibits 26 and 27 and 28, which are the statements from Merrill Lynch, E. A. Pierce and Cassell, and Merrill Lynch, Pierce, Fenner & Beane?

A. Yes, sir. [592]

Q. Are those things brokers and broker transactions that are referred to in the item I have been asking you about?

A. Yes, sir, they are.

Q. And those merely showed that they owed Mr. Ormont on December 31, 1943, \$2447.38?

A. That's what they showed that they owed Mr. Ormont.

Q. They owed him that?

A. That is correct.

The Court: It shows no stocks?

The Witness: The stocks were sold, your Honor.

Q. (By Mr. Robnett): The difference between that figure and the \$2037.60, which is shown just above it, the second item above it, that differential of close to \$410 you show as an unreportable taxable income, do you?

A. Not all of that figure, no, because he sold the stocks at a profit of \$371.73. That is only reportable

(Testimony of J. Bryant Eustice.)

as 50 per cent, because he had held the assets over six months, and it was taken into income at 50 per cent or at \$185.87.

Q. \$185.87?

A. That is the adjustment, as shown on line 6 of adjustments for 1943.

Q. Do you claim that, the \$185.87, growing out of that transaction as unreported income for that year?

A. Yes, for 1943. [593]

Q. Yet, isn't it a fact that according to your own records, or these exhibits I have shown you—isn't it a fact that Mr. Ormont never was paid that \$185.87, or any of the \$2447.28 until 1945 by the concerns whose names are on those exhibits.

A. That is correct, he did not avail himself of his privilege of drawing that money out until 1945.

Q. In other words, he did not receive the cash on that until 1945?

A. That is correct.

The Court: Were you calculating this on a cash basis?

The Witness: On a cash basis, you Honor, yes, sir, on the opinion that the money was available to him.

The Court: If someone owes you some money on December 31st, and you don't collect it for eight months, although by law you are entitled to it, you have to report it on a cash basis, is that your theory?

The Witness: My theory is, if it is income, and you haven't collected it until the following year, and there is some restriction on it, it is income.

The Court: How do you know what he did?

(Testimony of J. Bryant Eustice.)

The Witness: In some cases, Like Merrill Lynch, Pierce, Fenner & Beane, you know you can go there and collect it any day, if that amount is due you at that time. Mr. Ormont did not avail himself of that privilege until 1945. [594]

The Court: You say that is your opinion? If some man went down here, you would have a good claim against him, because he broke one of the stenographer's legs last week when he tried to get out in a hurry?

Mr. Strong: That isn't the case, your Honor. It shows it was available.

The Court: If you are going to practice law on the basis that all the money you think is due you you are going to collect——

Mr. Strong: This is a different story.

The Court: If it was on a cash basis, it seems to me it was a cash basis. However, there may be some explanation.

Mr. Robnett; I move to strike out the witness' voluntary statement that he could collect it any day if he desired.

The Court: That is a conclusion of the witness, and the jury will disregard it.

Mr. Strong: It is an explanation of why he took it into account.

The Court: The statement of the witness is stricken from the record as a conclusion.

Q. (By Mr. Robnett): In connection with your testimony concerning the purchase of \$10,000 worth

(Testimony of J. Bryant Eustice.)

of G bonds on May 5, 1943—ten \$1000 bonds—have you your notes on that?

A. Yes, sir. [595]

Q. You testified that you traced out in that transaction \$8147.73, and therefore that amount was not considered by you as unreported income, is that correct?

A. That is correct.

Q. You also testified that there was cash in the transaction of \$1852.27, and that item you did consider and figure as unreported income and taxable income?

A. That is correct.

Q. Will you show me, please, whether or not you have anything to indicate that that was cash, that \$1852.27.

A. I don't know as we have anything here in our possession. I went to the bank and requested them to look this item up for me, and they produced their records, and showed me that that——

Q. Just a minute. You saw some bank records?

A. Yes, sir.

Q. You concluded from that, did you, that that was cash.

A. Yes, the records indicated that that was cash. That is what they told me.

Q. Is there a deposit slip showing any cash on or about that date, in that amount, \$1852.27?

A. Showing that deposit?

Q. Yes.

A. No, not that I know of. As nearly as I remember [596] the transaction, they showed me the bond slips used for the purchase of the bonds, and indicated where the funds came from for that.

(Testimony of J. Bryant Eustice.)

Q. Did you make a memorandum of that purchase slip?

A. I made the memorandum that I have here on my work papers.

Q. Let me see it, please.

A. That that eighty-one——

Q. Just a minute. All you have there is, unexplained funds, cash, isn't it?

A. That is correct, yes.

Q. You have no memorandum of the purchase slip for the bonds?

A. No, I have no copy of that.

Q. You didn't take off any copy of it at all?

A. No.

Q. Did you examine it?

A. As I recall, yes. That is, the clerk showed me it there. I remember the transaction. That I had requested them to look that item up for me, and probably a week or two later I went back down there, and they said they had the information for me.

Q. That was May 5, 1943, wasn't it?

A. May 5, 1943.

Q. Did you have, or do you have there in Exhibit 40 any [597] record showing tracings by you of a check dated 4/26/1943? That would be April 26, 1943, for \$1332.27, by the Acme Meat Company to Sam Ormont?

A. No, I have no record of it in my papers.

Q. You have no record of ever having seen such check, or examined it, or traced it out, to find what it was for, do you?

(Testimony of J. Bryant Eustice.)

A. No. I see it isn't charged to his capital account or his personal account.

Q. Then, as to that item, you did not charge it to Mr. Ormont as an income, did you?

A. This amount of 13——

Q. \$1332.27?

A. No, the item you referred to I did not show what it is, but I didn't take it into account as income, no, sir. [598]

The Court: But you did figure the \$1800 was unexplained income?

The Witness: Yes, your Honor.

Mr. Robnett: I would like to have this check marked as the next exhibit.

The Clerk: R.

(The check referred was marked Defendants' Exhibit R for identification.)

Mr. Robnett: And this check as the next one.

The Clerk: S.

(The check referred to was marked Defendants' Exhibit S for identification.)

Q. (By Mr. Robnett): I am going to show you Exhibit R, which is a check on the Security—pardon me, counsel.

(Exhibiting document to counsel.)

Q. (By Mr. Robnett): ——which is a check dated 5/1/1943, being check No. 3, on the Security-First National Bank and made payable to the Se-

(Testimony of J. Bryant Eustice.)

curity-First National Bank for \$8147.73. Did you ever see that check before?

A. Yes, sir, I believe I have.

Q. Isn't that the check you examined and entered as the check payment on those \$10,000 worth of bonds?

A. Yes, it is.

Mr. Robnett: I offer that in evidence. [599]

Mr. Strong: No objection.

The Court: Admitted

(The document referred to was received in evidence and marked Defendants' Exhibit R.)

Q. (By Mr. Robnett:) Now I will show you Exhibit S, which is a check of the Acme Meat Company to Sam Ormont, dated 4/26, 1943, being check No. 1, and is for the sum of \$1332.27, and ask you to examine that.

A. (Examining check)

Q. Did you ever see that check before?

A. I expect I have seen the check; yes, sir.

Q. You say you have no record of ever having made any tracing of where it came from or what it was for?

A. I have a record of his capital and drawing account and it is not, as my records indicate, charged to his capital or drawing account of the Acme Meat Company.

Q. According to your records, have you got it charged at all?

A. No, I haven't a transcript of the other parts of his records. It would be quite voluminous.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: I offer that in evidence.

Mr. Strong: No objection.

The Court: Admitted. [600]

(The document referred to was received in evidence and marked Defendants' Exhibit S.)

Mr. Robnett: Now, Mr. Clerk, if you will kindly mark these. I have nine checks there that I would like to have marked as our next exhibit.

The Clerk: T.

(The checks referred to were marked Defendants' Exhibit T for identification.)

Q. (By Mr. Robnett): I will again show you Exhibit S and ask you to state whether or not you found that that check had been used in the purchase of those \$10,000 worth of bonds as a part of the \$1800 and some dollars that you testified to.

A. I didn't find that it; no, sir.

Q. You never traced the check out at all, did you?

A. As to what it was used for, no, I couldn't tell you where it was charged on the books and records, that particular check. I can say that it was not charged to his drawing account.

Q. I will now show you Exhibit T, which I believe contains nine checks, all personal checks of Sam Ormont drawn on the Security-First National Bank of Los Angeles, Huntington Park branch, to various payees and in various amounts, and ask you to examine those.

A. (Examining documents.) [601]

(Testimony of J. Bryant Eustice.)

Q. Did you ever see those checks before?

A. I believe I have. They are personal checks drawn on his personal bank account.

Q. Will you kindly—I will give you a piece of paper and a pencil—I will give you this blank piece of paper and I am going to ask you to take the amounts of the various checks and add them up.

A. (Making calculation) I get a figure of \$1332.27.

Q. Now I will ask you to compare that figure that you have just given us with Exhibit S, which is the check from the Acme Meat Company to Sam Ormont, dated 4/26/1943.

A. It is the same amount.

Q. Exactly the same amount, isn't it?

A. Yes.

Mr. Robnett: I offer in evidence the figures that the witness just made.

Mr. Strong: No objection.

The Clerk: U.

The Court: Admitted.

(The check referred to was Defendants' m evidence and marked Defendants' Exhibit U.)

Q. By Mr. Robnett: Now, in checking to find out the condition of Mr. Ormont's accounts, his various accounts and his income, didn't you check the bank books of the Acme Meat Company and their [602] checks that they had issued to him particularly?

A. Yes, I checked the checks that were drawn as I went over them.

(Testimony of J. Bryant Eustice.)

Q. And didn't you also examine Mr. Ormont's person bank account and his checks?

A. Yes, I listed the checks on the personal bank account.

Q. Now I will ask you if, when you made the examination of those records, the check books and checks, if you didn't then find and determine that the check, which is Exhibit S in this case, being for \$1332.27, by the Acme Meat Company to Sam Ormont, was in repayment to Sam Ormont for the checks, Exhibit T, which you have totaled and amount to exactly the same amount, and are made to various persons and were repaying Mr. Ormont for those expenditures that he had made to those payees in behalf of the Acme Meat Company.

A. No, I didn't determine that. I would have had to know what I was looking for there in the absence of books and records. If he or anybody that was familiar had told me that was what had taken place, I would have known what to look for.

Q. Now I ask you if, when you were checking on that \$10,000 bond purchase of May 5, 1943, if you didn't also find that not only the check for \$8147.73, which is in evidence as Exhibit R, not only that check was used in that purchase but likewise there was used in that purchase a money order for \$20. Did you find that out?

A. No, I did not.

Q. And there was likewise used in that purchase, interest paid by the Government of the United States on some of the bonds Mr. Ormont had to the

(Testimony of J. Bryant Eustice.)

amount of \$50, and that \$50 was used on account of the purchase of these bonds.

A. I did not find that; no.

Q. Did you ever try to find anything of that sort?

Mr. Strong: I object, your Honor. There is no evidence that those are the facts at all.

The Court: Objection overruled.

Mr. Robnett: Will you read the question.

(The question referred to was read by the reporter as set forth above.)

The Witness: I have explained that to be that I believe I went to the bank and got what information they had available.

Mr. Robnett: I move to strike out the answer as not responsive and ask that the witness be instructed to answer the question yes or no.

Mr. Strong: I think the witness should be instructed to tell the truth, your Honor.

The Court: I had assumed that he was telling it all the time. I didn't know that he needed that instruction.

Mr. Strong: But if the answer yes or no isn't the entire story, I think he can explain. [604]

The Court: That is a different situation.

Mr. Strong: But to force him to answer yes or no may not tell the whole story.

The Court: He can answer the question yes or no.

The Witness: Will you read it again?

(Testimony of J. Bryant Eustice.)

(The question referred to was read by the reporter as follows:

(“Q. Did you ever try to find anything of the sort?”)

The Witness: The answer is yes.

Q. (By Mr. Robnett): Did you in that effort investigate as to whether or not the Government of the United States had paid Mr. Ormont \$50 in interest on bonds? That can be answered yes or no.

The Court: That is the question he just answered. He said he tried to find out.

Mr. Robnett: I will ask him another question.

Q. What did you do in trying to find out about any interest that had been paid Mr. Ormont on bonds.

Mr. Strong: I object, your Honor. There is no evidence of any interest paid Mr. Ormont that was used to purchase anything.

The Court: Objection overruled.

The Witness: Well, in going over the analysis of his deposits I located what he did with some of the money that he [605] received as interest on Government bonds, and I deducted that from the total amount that he had received and reported on his income tax return and considered, not having found what he did with the balance of it, and the taxpayer not having books and records, I considered that he had that much available for personal living expenses and included that in the amount that I showed that he had available for personal living expenses.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Did you in that examination find that he had received \$50 in interest some time near the first of May 1943 on Government bonds?

A. Oh, no, I had no way of finding that.

Q. You had no way of finding that?

A. No, sir.

Q. Do you not, in your capacity, have available to you for examination the records of the Government of the United States as to payment of interest on bonds?

Mr. Strong: That is argumentative, your Honor.

The Court: Objection overruled.

The Witness: My understanding is that we can write to Chicago, where the disbursing office is, and get that information as to what has been paid but they can't tell you what the disposition was that the taxpayer makes of that money.

Q. (By Mr. Robnett): I understand that. I am not asking you that, I am [606] asking you if you had a means of finding out if he got any such money.

The Court: Did you make such an inquiry of Chicago?

The Witness: No, your Honor.

The Court: These bonds are the bonds that you pay the face value and then the Government pays interest rather than E bonds that you buy and wait for the interest?

The Witness: That is correct, your Honor.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Now, Mr. Eustice, are you in a position to say that Exhibit S, which is the Acme Meat Company check for \$1332.27, was not used by Mr. Ormont in the purchase of those \$10,000 worth of bonds?

A. No, I am not in a position to say that it was not.

Q. Now I ask you if that check was so used, would it not reduce to that extent and in that amount the item you charged against him, against Mr. Ormont, as unexplained income of \$1852.27.

A. It would reduce the amount that I show as unexplained income to purchase United States Government bonds by that amount. [607]

Q. Thank you. And if Mr. Ormont used a money order of \$20, and a United States Government payment of \$50 as interest on bonds, on the purchase of these \$10,000 worth of bonds, would it not likewise, to the extent of those two items, \$70, reduce the \$1852.27?

Mr. Strong: That is objected to upon the ground that there is no evidence that any such sums were used on the purchase of these bonds.

The Court: Objection overruled.

The Witness: Can I have the question?

(Question read by the reporter.)

Q. (By Mr. Robnett): Which latter sum you charge as unreported income?

A. Yes, it would to the extent of the \$50 item. I know where that is from. I don't know where the \$20 came from.

(Testimony of J. Bryant Eustice.)

The Court: It depends on the source of the \$20.

A. Yes, your Honor. This would also reduce the amount of money he had available for person living expenses.

Mr. Robnett: I move to strike out the voluntary statement of the witness as not responsive to the question, if the Court please.

The Court: I don't know what difference it makes.

Mr. Robnett: I don't either.

The Court: I have been studying your statements since that time. If you take it off from one side you have go to [608] put it on the other, and you took it off of the increase.

Q. (By Mr. Robnett): You testified as to the purchase by Mr. Ormont, on January 18, 1943, of \$7000 worth of bonds, and said that he paid \$5000 on that purchase price by check No. 336, I believe from the Acme Meat Company, and that the source of the other \$2000 was unexplained, and, therefore, you charged it as unreported income?

A. That is correct.

Q. That is correct? A. Yes.

The Court: May I have the question?

(Question read by the reporter.)

The Court: Those again were par value bonds, face value bonds?

The Witness: Yes, your Honor, that is correct.

Q. (By Mr. Robnett): Have you, in your work sheet, Exhibit 40, a record of the examination of the check for \$5000, which you say was used?

(Testimony of J. Bryant Eustice.)

A. I haven't a record of the check, what was on the check, no.

Q. May I see what you have, please?

The Court: If I understand your testimony about the \$1300 check, you don't have any record of that at all, the one we were talking about a few minutes ago? You don't have [609] any record of the disposition of that all?

A. No, your Honr.

The Court: It wasn't charged to his capital account, or credited to it, or credited to his drawings in any way?

A. No; as it has been indicated here, the taxpayer made certain purchases of these various items, amounting to \$1332.27, which was charged to his personal account. There were no invoices presented regarding these items, and I concluded——

The Court: It was unexplained income?

The Witness: No, I concluded that the amount charged to his personal account was living expenses of the taxpayer, and that this other item did not show up in his withdrawals from the business, but, apparently, it was a check in reimbursement of a purchase that he had made.

The Court: If that did not show up on his books, then it was a check of his in reimbursement of another purchase he had made?

The Witness: I don't remember that particular check.

The Court: That is, if it had shown in his books you would have given him credit for it?

(Testimony of J. Bryant Eustice.)

The Witness: If I had tied the two in together, yes, your Honor, but I never tied all these items in together.

The Court: What I am getting at is, whether or not you remember that item specifically, to see whether or not there [610] was a possibility of an error in his bookkeeping?

A. I did not make a specific examination of that item. This is the item, check No. 336.

Q. (By Mr. Robnett): On what bank?

A. Bank of America, Brooklyn and Soto. I think the check indicated that it was cashed at that bank, and I considered that it would have been used for the purchase of that bond.

Q. And you made this record of this bank account, did you?

A. This is his capital account.

Q. His capital account? You mean you made this page did you?

A. No, sir.

Q. You took this off?

A. It was copied by Mr. Phoebus from the books.

Q. As he has it, it was check No. 339?

A. 336.

Q. Whose check was that?

A. The Acme Meat Company's check.

Q. Dated what day?

A. It was charged to the capital account January 8, 1943. That might not be the date of the check.

Q. You say that was on the Bank of America?

A. No. His check indicated that it was cashed at the Bank of America, Brooklyn and Soto Streets.

(Testimony of J. Bryant Eustice.)

Q. But you don't have a record of what bank it was drawn on?

A. Oh, yes, it was drawn on the Acme Meat Company's account.

Q. In what bank?

A. Their account at that time would have been at the Security First National Bank, Huntington Park.

Mr. Robnett: I will ask that this check be marked as our next exhibit.

The Clerk. V.

(The document referred to was marked as Defendant Sam Ormont's Exhibit V for identification.)

The Court: What is U?

The Clerk: That is a blank sheet of paper.

The Court: Blank?

The Clerk: Well, it has some figures on it.

Q. (By Mr. Robnett): Did you examine the \$5000 check?

A. I believe I did, yes, sir.

Q. I show you Exhibit V, and ask you to look at that check.

A. Yes, sir.

Q. Did you ever see that before? [612]

A. I believe I have.

Q. Is that the check that you have in your statement that was used on the purchase of these bonds?

A. Yes, I believe that is the check.

Q. Do you see any No. 336 on that check anywhere?

(Testimony of J. Bryant Eustice.)

A. Looking at this now, this capital account, as copied by Mr. Phoebus, it is possible that he indicated that that was the check register page number, 336.

The Court: The answer may be stricken.

Mr. Robnett: I move to strike the answer as not responsive.

The Court: Mr. Strong will make all the arguments to the jury. Just answer the question. He asked you a simple question: Do you see the check No. 336?

The Witness: It is check No. 4413.

The Court: That is not the question. Do you see check 336 on the check? Can you answer that?

The Witness: The answer is no.

The Court: We will take a short recess. [613]

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

Mr. Robnett: I now offer in evidence Exhibit V, just identified by the witness, a check for \$5000.

Mr. Strong: No objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Defendants' Exhibit V.)

Q. (By Mr. Robnett): Mr. Eustice, referring to the \$5000 check, Exhibit V, that you have just examined, did you in your calculations consider and charge that as income of Sam Ormont for the year 1943?

A. No, sir, I did not.

(Testimony of J. Bryant Eustice.)

Q. I mean by that, not unexplained income but did you charge it up as a part of his reported income?

A. No, as no part of his income.

Q. What did you charge it to, if at all?

A. I considered that it was money available to buy this particular bond.

Q. Now these bonds were purchased on about the 18th day of January 1943, you say?

A. I understand that was the date on the bond, the [614] date issued.

Q. That is the date on the bonds?

A. Yes.

Q. All right. You don't know what date they were purchased, do you?

A. No, sir.

Mr. Robnett: I ask to have this marked as the next exhibit, please.

The Clerk: W.

(The document referred to was marked Defendant's Exhibit W for identification.)

Q. (By Mr. Robnett): I will show you Exhibit W and ask you if you have ever seen that or the original of it.

A. No, sir, I have not.

Q. That is, as you note, an application for United States savings bonds, defense series G, in the amount of \$7000, isn't it?

A. That is correct.

Q. And it is dated 1/9/1943, isn't it?

A. That is correct.

(Testimony of J. Bryant Eustice.)

Q. I ask you if you have on your records any purchase of bonds in the sum of \$7000 by the defendant Sam Ormont on that date, January 9, 1943.

A. No, sir. [615]

Q. The only \$7000 purchase of bonds that you have are, the only item of that, is the item you mentioned a moment ago where the bonds were dated in February, is that correct?

A. January, I believe.

Q. January? A. Yes.

Q. Pardon me. January 18th? A. Yes.

Q. Would you not say that this is the same bonds that you have referred to in your testimony?

A. It would appear to be the same bond. They were issued apparently by the Federal Reserve Bank at San Francisco. They may be dated later than the application.

Q. And the bonds that you have the record of were bonds that were made to Samuel Ormont and Mrs. Dora Goldberg, were they?

A. That is the information I have on it; yes, sir.

Q. And you note that on Exhibit W, that that is the way the bonds were to be?

A. The same name; yes.

Q. The same names. All right.

I now offer that in evidence.

The Court: W is admitted.

(The document referred to was received in evidence and marked Defendants' Exhibit W.)

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Now, Mr. Eustice, aside from the \$5000 check that you say was used in the purchase of those bonds, did you make any attempt to find or determine the sources of other funds up to the amount of \$2000 that were used in the purchase of those bonds? A. Yes, sir; I did.

Q. In that attempt, did you examine the checks of Sam Ormont on his personal account?

A. Yes, sir.

Q. And did you also examine any other checks, checks of the Acme Meat Company, to Sam Ormont?

A. Yes, sir.

Q. Did you examine any other checks from anyone else in that connection?

A. I wouldn't have access to checks of anyone else.

Q. Do you have in your record an item of a check dated 1/9/1943 by Sam Ormont on the Security-First National Bank of Los Angeles, Huntington Park branch, for \$595.25?

A. What was the date again, please?

Q. The date is 1/9/1943.

A. I have a check that was shown charged to his bank account of \$595.25 charged January 13, 1943.

Q. Yes. And what did you credit that to, or charge to in your analysis?

A. I considered that it was cash available to the taxpayer for personal living expenses.

Q. You did not, in your examination of that check, consider it was cash available by the defendant on account of the purchase of these bonds?

A. No, sir.

(Testimony of J. Bryant Eustice.)

Q. In your examinations of the \$2000 item, you charged them all to unexplained and unaccounted for taxable income against Mr. Ormont, didn't you?

A. That is correct, explained by the taxpayer.

Q. And in doing that, you did that, did you say before, because you could not find any sources from which that \$2000 might have come, or any part of it?

A. That was one of the reasons, yes, sir.

Q. And you say this \$595, you simply charged that to his living expenses?

A. Yes, I considered that was cash available for his living expenses.

Q. But you did charge it, did you not, in your calculations, to him as income for that year?

A. The \$595.

Q. Yes. A. No, sir. [618]

Q. You did not? A. No, sir.

Q. You did not charge any items that you placed in living expenses as income of Mr. Ormont for that time?

A. Maybe I did not understand your question.

(Question read by the reporter.)

A. No, sir, I determined what he had available, and what was indicated, and considered that all as personal living expenses, and, of course then made the observation as to whether that was a reasonable amount or not.

Q. I understood from you this morning——

The Court: But you disallowed a lot of so-called personal expenses, didn't you?

(Testimony of J. Bryant Eustice.)

The Witness: No, your Honor.

The Court: You did not disallow any?

The Witness: No.

Q. (By Mr. Robnett): Did I understand you correctly this morning with regard to Exhibit S, this Acme Meat Company's check for \$1332.27, that you said that you charged that, or you would charge that to personal living expenses?

A. What I said was that these other checks drawn on his personal bank account, which totaled \$1332.27, as they were drawn to his personal bank account, and there was no books or records on his personal bank account as to what [619] those items represented, I considered that they were checks drawn for his personal living expenses.

Q. You examined the checks, didn't you?

A. Yes, I had possession of all those checks.

Q. I want to show them to you, Exhibit T. That first check, who was that drawn to?

A. It looks like Hachten & Robinson Livestock Company.

Q. For \$494.90? A. Yes, sir.

Q. You charged that then to Mr. Ormont's living expenses, did you?

A. Yes, personal living expenses. It might be living expenses, it might be other expenses that he might have that were not deductible on his income tax return.

Q. What other expenses would it be?

A. Well, if he issued a check at any time for the payment——

(Testimony of J. Bryant Eustice.)

Q. I mean this one here?

A. Yes, if it was not deductible, and it was indicated by the fact that he drew a check on his personal bank account, it was indicate that it was not deductible as a business expense, so I considered it as a personal expense. In other words, it might still be a customer, or somebody he purchased from, and still be an item the taxpayer could not substantiate, so, instead of drawing the check on his business [620] account, he could have drawn it on his personal account.

Q. So you charged this as non-deductible expense?

A. Yes, personal expense.

Q. That is the way you have it?

A. I considered it as personal expense.

Q. Let us take up the next item on this same Exhibit T. That is a check, is it not, to the California Livestock Com. Co. for \$26.40?

A. Yes, and the things I have said about that other check equally apply.

Q. The same way, you charged it as a living expense, and non-deductible?

A. I considered it a living expense, yes.

Q. Then we come to another check to the same people as at first, a check to Hachten & Robinson Livestock Com. Co. for \$157.70. Is that the same, and your explanation would be the same as to how you charged that to living expenses and non-deductible?

A. That is correct. I considered it a living expense.

(Testimony of J. Bryant Eustice.)

Q. The next one is Holmes Livestock Com. Co. for \$55.20. The same explanation as to that, and as to the manner in which you would charge it?

A. That is correct.

Q. The next one would be to P-r-o-d, it looks like, Livestock Mktg. Assn., for \$70.10? [621]

A. That is correct.

Q. The same explanation as to that?

A. Yes, the same thing. [622]

Q. And the next one—it looks like D. H. Lilly-white, does it not? A. Yes.

Q. For \$249.30? A. Yes.

Q. The same as to that? A. Same thing.

Q. The next one, to Gallagher Livestock Com. Co., \$35.40? A. That's correct.

Q. Same explanation as to that check?

A. Yes.

Q. And the next check, Hachten & Robinson Com. Co., \$64.35? A. That is correct.

Q. And the next one, Producers Livestock Mktg. Assn., \$82.82; some explanation as to that?

A. Same thing.

Q. Same application of them?

A. That is correct.

Q. And the next one, Southwest Commission Co., \$89.10.

A. That is correct; same answer.

Q. In other words, if I understand you correctly, you charged everything that Mr. Ormont drew against his personal account that you didn't other-

(Testimony of J. Bryant Eustice.)

wise find what you though was an [623] explanation, you charged it as living expense and not deductible?

A. Considered that it was personal expenses. Not always necessary as living expenses, but personal items that would not be deductible on his business. In other words, the fact that it was drawn on his personal account indicate that.

Q. What is the total amount that you have so charged against him in 1943?

A. Considered as personal living expenses?

Q. Yes.

The Court: On checks like this, you mean?

Mr. Robnett: Yes, checks like this, and all other amounts that he charged to his living expenses.

The Court: By the way, did you go to see these livestock marketing associations, or whatever they are, to see whether he bought meat from them of livestock?

The Witness: No, your Honor.

The total amount for 1943 was \$3082.66.

Q. (By Mr. Robnett): \$3082.66?

A. That is correct.

The Court: That is the amount you charged against him as what?

The Witness: Considered that he had that amount available for personal living expenses.

The Court: That is, out of the business?

The Witness: Money that he drew from his business and money that he drew by checks that showed that he drew out of his bank account and

(Testimony of J. Bryant Eustice.)

includes these checks that Mr. Robnett has shown, included \$1332.27. If it so happens, and which apparently is correct, that the \$133.27 does not belong in there, well then——

The Court: It is a refund to him of money that he spent for the business?

The Witness: That is correct.

The Court: Buying livestock?

The Witness: That is correct. Then he had that much left available for living expenses, or the difference between \$3082.66 and \$133.27.

The Court: Which would reduce the total income that you disallowed?

The Witness: If he actually spent \$3082, or anywhere near that amount—that is not an exact figure, your Honor; that is an estimate—if it can be said that he spent approximately \$3000, and this amount is taken out of it, then he must have spent cash that was not available, that is, the money had to come from some place for his personal living expenses or his personal expenses.

The Court: You mean you found \$3000, or whatever it is, and now you find \$1300 which appears to be, at the present [625] state of the record, a refund to him, you are proceeding on the basis that he spent \$3000 anyhow on living expenses?

The Witness: Yes, as a reasonable amount of living expenses.

The Court: That he spent that much for living expenses?

(Testimony of J. Bryant Eustice.)

The Witness: I have other evidence to indicate that too, your Honor, that he spent that much money for personal living expenses.

The Court: In other words, if he didn't spend those checks that he gave to these market associations for living expenses, but spent them in his business, he spent some other sum equivalent to that amount?

The Witness: If it still can be said that he spent \$3000 or approximately that amount.

The Court: For living expenses?

The Witness: For living expenses. The cash had to come from some place.

The Court: I understand.

Q. (By Mr. Robnett): Now, do you have a record of a check from the United Dressed Beef Company, dated December 11, 1942, for \$204.75 to Sam Ormont?

A. What is the date, please?

Q. December 11, 1942.

A. No, I don't find such check. [626]

Q. Perhaps it would aid you if you will revert to the Sam Borne matter. Do you remember that?

A. Yes, sir.

Q. Do you have that check, or any such check?

A. I show that he received an interest check from Sam and Ben Borne in 1943 of \$105, which was not reported.

Q. That was 1943?

A. In 1943.

(Testimony of J. Bryant Eustice.)

Q I am talking about 1942.

A. In 1942 he received altogether \$1,299.75, of which he deposited \$990 and apparently cashed checks for the amount of \$309.75.

Q. Was there one check for that amount, that you just gave?

A. I could not say whether it was one check.

Q. What did you do with regard to the money received from, as you have it there, Sam Borne—that was the same as United Dressed Beef Company, or do you know?

A. Yes, they are owners, I understand, of that, or the major stockholders.

Q. All right. Now what disposition did you make with regard to that with regard to reflection on income?

A. I didn't take any additional income into account. The \$1299.75 had been reported by the taxpayer as interest income, the \$990 I showed as having gone to his bank account, [627] having been deposited in his bank account, and the \$309.75 as being cash available for personal expenses.

Q. You did not figure any of those items as available for purchase of those bonds, the \$7,000 worth of bonds?

A. No, sir.

Q. Did you at any time see checks of the Borne transaction, any of the checks which they gave?

A. Yes, I saw some of them.

Q. You examined them, didn't you?

A. Yes.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Will you mark this?

The Clerk: X for identification.

(The document referred to was marked Defendant's Exhibit X for identification.)

Q. (By Mr. Robnett): I am going to show you Exhibit X, which is the check I have just described to you, dated December 11, 1942, for \$204.75, from United Dressed Beef Company. Did you ever see that check before?

A. I couldn't say whether I saw this particular check before or not. I was down to the office of the United Dressed Beef and examined the checks. I asked them to look up as many of these checks that they could find, they did not find all of them, but I got all the information that I could get from them at the time. [628]

Q. Did you get any information concerning a check of this kind?

A. Not that I recall. If I had, I couldn't tell by looking at the check what disposition was made of it.

Q. I understand you can't.

I offer it in evidence at this time, if your Honor please.

Mr. Strong: I object on the ground there is no foundation laid.

The Court: It will be marked for identification.

Mr. Robnett: All right.

Q. Now in determining whether or not there were any funds available which Mr. Ormont could

(Testimony of J. Bryant Eustice.)

have used in the purchase of those \$7,000 bonds, aside from the \$5,000 check, did you examine any checks of the Acme Meat Company?

A. I examined the checks but I didn't determine that any of those checks had been used to pay any part of the \$2,000.

Mr. Robnett: I would like to have this group of checks, there seems to be eight checks, marked as the next exhibit.

The Clerk: Y.

(The documents referred to were marked Defendant's Exhibit Y for identification.)

Q. (By Mr. Robnett): I now show you Exhibit Y, consisting of eight checks of the Acme Meat Company to Sam Ormont, and ask you to examine [629] those checks. A. Yes, sir.

Q. Have you ever seen those checks before?

A. I would say I have; yes, sir.

Q. And you checked them, did you not, when you were making your analysis of his bank account and of his income? A. That is correct.

Q. And you have a notation concerning these identical checks, do you, in your notes, in your Exhibit 40?

A. No, not regarding those particular checks.

Q. You don't have anything about them at all?

A. I have a summary here showing the total amount that the taxpayer withdrew from the Acme Meat Company.

(Testimony of J. Bryant Eustice.)

Q. In what year?

A. I am looking at '42. Those are '43, are they not?

Q. Seven of them I believe are '42 and one is '43.

By the way, are you looking at Exhibit 40 or any exhibit that has been offered here or has been identified?

A. This is a part of my work papers here which is a cumulation and summaries of the figures that are on these work papers and are much more accessible.

The Court: I thought all your work papers were offered for identification.

Mr. Robnett: That is what I understood.

The Court: These are additional work papers that are not [630] included?

The Witness: This is what I am working towards in making up the work papers, and I use information from my work papers to accumulate and put on these sheets in more presentable form.

The Court: That is a part of your work papers?

The Witness: Yes.

The Court: That isn't part of your report?

The Witness: Yes, it is a part of my report also.

The Court: But it still a part of your work papers? Is it or isn't it?

The Witness: Yes.

The Court: If he needs it to refresh his memory I think it ought to be marked for identification.

(Testimony of J. Bryant Eustice.)

Mr. Strong: I thought it was part of the work papers that were marked. I have no objection to having it marked. May we have it marked as part of the other exhibit?

The Court: It will be marked Exhibit 40-A.

(The documents referred to were marked Government's Exhibit No. 40-A for identification.)

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m.)

Los Angeles, California, Tuesday, June 3, 1947
2:00 p.m.

Mr. Robnett: There is a matter I thought should be called to your Honor's attention, that happened this morning while court was in session. A duces tecum subpoena was handed to Mr. Sam Ormont, one of the defendants in this case, to produce records, and I want to call the court's attention to it before the question of production is determined. It is an order to produce this afternoon, at 2:00 o'clock, at this time. He could not, of course, do it within that length of time at all.

The Court: In this case?

Mr. Robnett: In this case, yes. Certain of his books and records or the Acme Meat Company's books and records, of which he is the owner, and

at this time we make the suggestion to the court that I do not believe it is proper to require the defendant to furnish any evidence for the prosecution in the case. Under the Constitution I think the defendant is protected against having to furnish any evidence, or, if he is required to furnish it, he should be granted immunity from any further prosecution, either in this case, or any other case the books would pertain to. That is what I wanted to call to your Honor's attention, to see whether or not it is going to be the order of the court that he produce them.

The Court: I have authorized no subpoena duces tecum in [635] this case. Nothing has been brought to my attention in connection with the matter. Was the subpoena secured by the prosecution?

Mr. Strong: It was secured, not directly from your Honor, but through the Clerk of the Court. I want to say, your Honor, I did not know it was served in court. I certainly would not have had it served in court at any time. That was an act on the part of the Marshal.

The Court: It is highly improper, certainly, for the Marshal to come in here and hand the defendant any document in the presence of the jury.

Mr. Strong: I don't think the jury knew what it was. The Marshal was not told to bring it into court. That was to be served outside.

The Court: What is your motion in connection with the matter?

Mr. Robnett: The motion is to quash service, if the court please, and to assign it as misconduct

on behalf of the plaintiff, to serve a paper while the proceedings were going on, before the jury in this court; or that the defendant be instructed by your Honor that he does not have to obey the subpoena.

The Court: The evidence in the case up to now is that Sam Ormont was the owner. I don't know what years.—Any and all records during the years 1944 and 1945 relating to [636] loans or payment of other funds to Phillip Himmelfarb, or to Acme Meat Company, Inc. There has been some suggestion that there was an Acme Meat Company, Inc. If that is the case, then the defendant here, if he is the person who has custody, and is in charge of those books and records for the Acme Meat Company, Inc., would be bound to produce them. But certainly not to produce any of his own books and records in connection with this prosecution.

Mr. Robnett: The corporation. Your Honor, I don't think this is directed to their books and records at all. I don't think it is.

The Court: It says to Sam Ormont and/or Acme Meat Company and Acme Meat Company, Inc.

Mr. Robnett: I did not know that.

The Court: But I have no knowledge, except the intimation here during the trial sometime that the Acme Meat Company was a corporation.

Mr. Kosdon: If the Court please, I think I can explain it. The Acme Meat Company was incorporated, I believe, on May 29, 1946, and commenced doing business sometime in June, 1946, and it has no bearing whatsoever on this.

The Court: This is made returnable on the 3rd day of June, at 2:00 o'clock p.m. I am surprised that it is a subpoena for the records of the defendant individually; and, in any event, I will consider this an oral motion to quash the [637] subpoena.

Mr. Robnett: Yes, your Honor.

The Court: And will continue the matter on the hearing of the motion to quash the subpoena until, say, tomorrow at 2:00 o'clock, at which time you can support it by the appropriate written documents and affidavits.

Mr. Strong: In this connection I would like to call your Honor's attention to page 371 of the record, where your Honor has pointed out, in refusing to admit secondary evidence, that the books themselves must be produced, and that there are processes of the United States Government to use, and you have the processes of this court. That is page 371 of the record.

The Court: That is correct. But you can't use the process here to have a man testify against himself. I meant to say, whatever process is available is available. If they are not available, they are not available and, certainly, you can't compel the defendant here to produce his personal books and records in this criminal proceeding.

Mr. Strong: We are laying the foundation for secondary evidence.

The Court: You can't use that as a foundation, because a defendant has a right to his books and records.

Mr. Strong: That is what your Honor said, what I read from page 371.

The Court: In any event, the hearing on the motion to [638] quash the subpoena is continued until tomorrow at 2:00 o'clock p.m.

Mr. Robnett: Thank you. That is all I had, your Honor.

The Court: Call the jury down.

(Jury return to court room at 2:10 o'clock p.m.)

J. BRYANT EUSTICE,

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified as follows:

Cross-Examination
(Continued)

The Court: Usual stipulation?

Mr. Robnett: Yes, your Honor.

Mr. Katz: So stipulated.

Mr. Strong: So stipulated.

Mr. Robnett: I first want to offer in evidence Exhibit Y for identification, the last exhibit that was identified by the witness.

Mr. Strong: May I look at that, your Honor? I don't remember what it was.

The Court: It was eight checks. The witness testified that he has examined those, I believe.

Mr. Strong: He said that he examined them, but that is about all.

The Court: They are admitted in evidence.

(The document referred to was received in evidence and marked Defendants' Exhibit Y.)

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Mr. Eustice, this morning you testified that you had allocated certain funds to Mr. Ormont's living account for 1943—if I have the figure correctly, if not you correct me—of \$3082.66. A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Will you give me the breakdown of that, that is, [640] just where you got those items and what they were?

The Court: Now you say, when you allocated that. You mean you have allocated that in rebuilding what you term here a comparative net worth statement?

The Witness: Yes, your Honor.

The Court: But you didn't allocate that in your adjustments to income, did you?

The Witness: No, sir.

The Court: All right.

Q. (By Mr. Robnett): Pardon me. Right on that, did you not charge that up as income to Mr. Ormont?

A. No, it was not charged up as income.

Q. Anything that he drew and it went into the living account was never considered by you as a part of his income for that year?

A. That is correct, in just accounting for funds.

Q. All right. Will you give me the information, please?

The Court: I don't understand that. You mean regardless of the amount of money that he drew

(Testimony of J. Bryant Eustice.)

out of the business and spent on himself you didn't call that income?

The Witness: No, I didn't call it income, your Honor.

The Court: You mean you didn't call it net income?

The Witness: Any part of the income, as long as he had—there was an indication that he had money enough of his [641] own from known sources to pay for these living expenses.

The Court: You mean you didn't call it additional income?

The Witness: I did not call it additional income.

The Court: But you did call it income?

The Witness: No, not income. This is just a matter of accounting for funds.

The Court: But you didn't call it additional income?

The Witness: No, your Honor.

The Court: But you did take that into account in calculating his gross income, did you not?

The Witness: I did in this respect, we use the figure—the figure I had here of \$3082.66—that is made up of checks that he drew on his personal bank account and added to that money that he had left over that I couldn't account for that I assumed that he used for personal living expenses.

The Court: I am not talking about that now, I am talking about the whole amount of money that he drew out and spent on himself, whether it was for rent or clothing or whatever it might be, didn't

(Testimony of J. Bryant Eustice.)

you take that into consideration in calculating his gross income at all?

The Witness: No, your Honor. What I was doing there, if the item was not a reasonable amount, well I would have had to make considerations, and so forth, in two ways—if I, as an example, can use an exaggerated figure on this and [642] state that the taxpayer had \$6000 available for living expenses—I could have said that he probably didn't spend that much money and he could have used a certain amount of that for the purchase of these bonds or any other expenses that I took into income.

If it had shown up that it was less than that figure, say only \$1000, and I estimated that he must have spent around \$3000, well then my attitude would have been that he must have used some of these unexplained funds in paying for his personal living expenses.

The Court: I still apparently am quite obtuse about this, I don't understand it. The gross amount of money that Sam Ormont received in each one of these years was his gross income, wasn't it, whether he spent it buying livestock, race horses, rent or presents for anybody. The gross amount of money that he received, no matter what he spent it for, was his income, wasn't it?

The Witness: Yes, I think the answer would be yes.

The Court: The gross amount of money that he received was his income?

(Testimony of J. Bryant Eustice.)

The Witness: That is right.

The Court: All right. Well, then, you did take into consideration in making your calculations the amount of money that he received and spent on his living expenses, didn't you, in making your calculations of his gross income? [643]

The Witness: Yes, I determined only in my proof of income, that is, on my net worth statement, your Honor.

The Court: Well, on your net worth statement you are trying to prove that your calculations are correct?

The Witness: Yes, sir.

The Court: But I am not talking about your net worth statement or about whether your calculations are correct or not correct; I understood you to say you didn't take it into consideration, but I cannot see how you can figure a man's income unless you do take it into consideration.

The Witness: Well, I have had to take it into consideration but I did not at that time add any additional income.

The Court: In his net worth statement?

The Witness: In his net worth or otherwise on account of money that he may have used for personal expenses because I thought that there was this amount, which was a reasonable amount.

The Court: Well, then, what you mean to say is that you did not charge him an additional income?

The Witness: Yes.

(Testimony of J. Bryant Eustice.)

The Court: The money that he spent in living expenses?

The Witness: Yes, your Honor.

The Court: But that you did take into consideration the money spent in living expenses in calculating his gross income? [644]

The Witness: Yes, your Honor.

The Court: All right.

Q. (By Mr. Robnett): Will you give me the breakdown of that then, please, that is, for 1943?

A. Yes.

Personal expenditures paid by cash, \$2566.95.

Q. That is cash?

A. Paid by checks drawn on his personal bank account.

Other personal expenditures——

Q. Pardon me just a moment. Was that last statement in connection with the \$2500, was that by check?

A. Yes, paid by check drawn on his personal business account.

Q. All right.

The Court: You said at first cash. You mean checks?

The Witness: Checks.

The Court: But not checks drawn to cash?

The Witness: No, sir.

The Court: All right.

The Witness: And other personal expenditures, which I considered paid by cash, \$515.71.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): That is cash, not checks?

A. That is cash that I determined he had available. [645] I don't know how he spent it as far as the detail on it goes, but he had that available.

Q. Where did you get that, that you knew that was available for living?

A. Well, the taxpayer drew from the Acme Meat Company \$12,296.03 as indicated by his drawing account. He deposited of that amount \$12,042.82 to his bank accounts, leaving a balance of \$2053.21 that I assumed was checks cashed, cash that he had.

He received checks for interest on Government bonds of \$387.50 and deposited of that amount \$125, leaving an amount available of \$260.50, but undeposited.

I believe by adding those two items together you will get the amount that I have used as expenditures paid by cash of \$515.71.

Those items added together, checks and cash, should give the amount of \$3082.66, which was the total cash available plus checks that he drew for living expenses, for personal expenses.

Q. (By Mr. Robnett): Now will you give me the detail that makes up that \$2566.95, and give me the bank, the check, the amount of the check and the number.

The Court: The total, Mr. Witness, for 1943 was \$6525.58? [646]

The Witness: Yes. I was about to explain that he had——

(Testimony of J. Bryant Eustice.)

The Court: That you disallowed?

The Witness: That he had some other items that I could definitely determine of payment on life insurance of \$704.95 and payments on 1942 Federal income tax of \$2477.91.

The Court: \$2447, isn't it?

The Witness: \$2477.91.

The Court: I am in error then because it says \$2447.

The Witness: Then he had taxes of \$260.06.

The Court: What are you reading from? One of these statements?

The Witness: I am reading from this, my work papers.

Mr. Strong: That is a summary of adjustments.

The Court: It has been typed wrong because mine is \$290.06.

All right. Plus the \$2566.95 and the \$515.71 makes \$6525.58 which was not all his living expenses, was it?

The Witness: No.

The Court: These are things that you disallowed? In other words, that is what you said he was not entitled to deduct.

The Witness: Well, it represented all of his personal expenses of life insurance and payments on income tax, and so forth.

The Court: All right. [647]

The Court: All right. Excuse my interruption. Go ahead. I think he asked you for a list of checks on the other. I wanted to follow the testimony. It

(Testimony of J. Bryant Eustice.)

is too easy to get thrown anyhow in a tax case.

The Witness: There are about 60 items of checks that are drawn on this account.

The Court: He said there are about 60 items. Do you want them all?

Mr. Robnett: I need them, because of the process——

The Court: That is all right. It is your lawsuit. You are entitled to have them if you want them.

Mr. Robnett: I need all of the checks charged to living expenses.

The Witness: These checks, as I recall, did not have any number on them. The date, I believe are the dates that they are charged to the bank account.

Q. All right.

A. Starting with January 6th, \$2.50, News Week;

\$595.25, check to Sam Ormont;

\$5.09, Southern California Gas Company. Excuse me a minute. These checks that were taken into account is something else, you don't wish them in, as I understand it.

Q. I want everything that makes up your \$2566.95.

A. O.K. \$7.46, Southern California Gas Company;

\$ 7.57, Department of Water and Power;

4.00, Southern California Gas Company;

113.18, Franchise Tax Commissioner;

249.26, ——apparently that isn't involved;

10.00, American Red Cross;

(Testimony of J. Bryant Eustice.)

10.00, W. H. Teasley;

494.90, Hachten & Robinson Livestock Commission;

157.50, to the same parties;

249.30, D. H. Lillywhite;

77.10, Producers Livestock Marketing Association;

26.40, California Livestock Commission;

55.20, Holmes Livestock Commission;

64.35, Hachten & Robinson Livestock Commission;

82.82, Producers Livestock Marketing Association;

35.40, Gallagher Livestock Commission;

89.10, Southwest Commission Company;

5.59, Department of Water and Power;

7.29, Southern California Telephone Company;

2.94, Southern California Gas Company;

7.49, Southern California Telephone Company;

7.82, Department of Water and Power;

3.95, Southern California Gas Company;

4.80, Bank of America;

4.95, Department of Water and Power;

8.48, Southern California Telephone Company;

3.72, Southern California Gas Company;

.21, bank charge;

6.95, Department of Water and Power;

6.68, Southern California Telephone Company;

2.99, Southern California Telephone Company;

30.00, cash;

6.79, Department of Water and Power;

.51, bank charge;

5.10, Southern California Gas Company;

7.95, Southern California Telephone Company.

That seems to be the end of 1943.

Q. Is that all of it? A. Yes, sir.

Q. I now show you Exhibit Y, which consists of several checks.

A. These are the ones we looked at this morning.

Q. Yes, you looked at these this morning. You said you had examined them before. Are each of these checks charged by you as a part of Sam Or-

(Testimony of J. Bryant Eustice.)

mont's living account, or living expenses for 1943?

A. Well, they would go into it indirectly, I would say, in cash items. They are money available.

Q. In cash items? A. Yes.

Q. There are not any of these checks you have just listed, I notice. [650]

A. That is correct, yes, sir.

Q. Have you, in your statement, or in your work sheets, these checks, and how you handled them in your accounting, these particular ones?

A. No, I do not.

Q. I will ask you now to refer to 1942, and tell me whether or not in 1942 you allocated any funds to Mr. Ormont's living expenses? If so, how much?

A. What would be called his living expenses, would be \$1703.24. There are two other items of personal expense. That is, payment on life insurance of \$1058.15; payment of 1941 Federal income tax, \$1015.17. Adding them to \$1703.24, we have a total of \$3776.56.

Q. I again refer you to Exhibit Y, and call your attention to the first seven checks therein. I believe they are each for \$100. And I will ask you if you charged these checks to Mr. Ormont as income, for 1942?

A. No, I didn't charge those checks.

The Court: When you say income tax——

The Witness: I mean taxable income.

The Court: Or additional income? The witness seems to have a different idea than I do about in-

(Testimony of J. Bryant Eustice.)

come. I don't know whether it refers to taxable income, net taxable income, or gross income.

The Witness: In this case I didn't charge these checks [651] to income in any manner.

The Court: You included them, however, in your calculations as to his total income.

The Witness: Yes, sir, in accounting for his funds.

The Court: In accounting for his gross income?

The Witness: Yes, your Honor.

The Court: So you did consider them as income?

The Witness: Not as income, your Honor. No; just as a matter of accounting for his funds.

The Court: These are checks from the Acme Meat Company to him?

The Witness: Yes, your Honor.

Q. (By Mr. Robnett): They are all dated in 1942, are they not?

A. They are all dated 1942, yes.

Q. What did you do with these, if anything, in your calculations, in arriving at Mr. Ormont's income, that is, taxable income for 1942?

A. Well, as far as the checks were concerned, that is, I took his total drawings from the business, as shown from his business records, and deducted from that the amount that he deposited to his personal bank accounts, and considered that the balance that was undeposited was the amount of \$506.09. I might state here, there might be, considering the fact that the taxpayer carried some of these checks around [652] with him for a period

(Testimony of J. Bryant Eustice.)

of time before he deposited them to his bank—there might be a little difference between one year and another. Just the same, with the bank account. I didn't take into account outstanding checks at the end of each year in determining the bank balances, because it would be difficult to tell. I was assuming that one would more or less offset the other, except in 1944 he did have one large check outstanding, and I took that into account.

Q. That's the only year?

A. Yes. So there might be, I say, just a slight discrepancy in that respect in the beginning and ending of the year. Understand, I had no books and records, nor the cooperation of the taxpayer in determining these matters.

Mr. Robnett: I move to strike out he had no cooperation of the taxpayer as a conclusion of the witness.

The Court: Yes, it is stricken out, and the jury instructed to disregard it.

Q. (By Mr. Robnett): Did you make a check of the Acme Meat Company's books—their check books, and check accounts?

A. Yes, I believe I have testified to that before that I did.

Q. No, I don't believe you have. That's why I wanted to get this straightened out. You did do that? And didn't you find at that time that these seven checks I have just [653] referred to, which are all dated in 1942, had gone out from the Acme Meat Company to Sam Ormont?

(Testimony of J. Bryant Eustice.)

A. Yes, I so stated in my report.

Q. And, therefore, these checks you counted as money he had received from the Acme Meat Company in 1942?

A. Yes, in the year that the checks were drawn and charged in the business.

Q. You treated the checks, did you not, as cash whether he had deposited them, or cashed them, or not?

A. No, sir.

Q. You did not?

A. No, I did not.

Q. You did not treat the checks as cash?

Mr. Strong: He said he didn't.

A. I told you how I made that determination. I will repeat it again, if you wish it.

The Court: I think you can just answer the question. When you are asked a question, and it calls for a yes or no answer, it is unnecessary to go on and repeat statements you previously made.

Mr. Strong: Except this question was asked and answered three times up to now.

The Court: Not that question: You treated it as cash.

Mr. Robnett: Counsel isn't listening.

Mr. Strong: Yes, I was listening. [654]

Q. (By Mr. Robnett): I show you a list of checks on Exhibit Y, 1-8-43, \$100, Acme Meat Company check to Sam Ormont. Did you, in your calculations of his 1943 income, use that check in any fashion to determine his income, or his taxable income?

A. That was used in determining or arriving at

(Testimony of J. Bryant Eustice.)

his taxable income, yes. I took it into account. I did not add it to income.

Q. You did not? A. That is correct.

Q. What did you do with it?

A. I considered it as a withdrawal from his business.

Q. From his capital account, I suppose?

A. Yes, charged to his capital account. [655]

Q. Did you do the same with the other seven checks that I have shown you in this exhibit that were drawn in '42, did you in '42 charge those against his capital account?

A. They were charged against his capital account and that is the way I considered them.

Q. Now when you were determining how he paid for the \$7000 worth of bonds purchased—and I will give you the date in a minute.

The Court: In January.

Mr. Robnett: Yes, in January 1943.

The Court: There was only one batch purchased in January, wasn't there?

Mr. Robnett: There is only one \$7000 batch purchased, I believe.

The Court: All right.

Q. (By Mr. Robnett): Do you know which ones I refer to and which we are talking about?

A. Yes, I know which ones you are referring to.

Q. You testified to one check here this morning of \$5000 that you determined went into those bonds. In determining where the balance of the \$2000 necessary to make up the \$7000 purchase came

(Testimony of J. Bryant Eustice.)

from, did you take into account any of the items in these checks, Exhibit Y?

A. No, sir, I did not. [656]

Q. You did not consider that any of this money was available for the purchase of those bonds?

A. That is correct.

Q. You noted, did you not, that these were all stamped by the bank as of January 12, 1943, or did you? A. I just noticed that now.

Q. You did notice that, didn't you?

A. Yes, that is correct.

Q. And that therefore none of them had been apparently cashed before?

A. That is correct.

Q. Yet you did not consider that any of this \$800 was available to Mr. Ormont to purchase bonds with in January of '43?

A. No, I used it as being available, these amounts as available for personal expenses.

Q. Personal expenses?

A. That is correct.

The Court: When you say "available" you considered that he used them for personal expenses?

The Witness: That is right, your Honor.

The Court: In '42, the seven of them, or whatever they are?

The Witness: In '42 and '43.

The Court: And the other one in '43? [657]

The Witness: That is right, your Honor. It is not just item by item but by using totals.

The Court: I understand, the total amount.

(Testimony of J. Bryant Eustice.)

The Witness: Yes, by using totals.

Q. (By Mr. Robnett): I thought you said a while ago that these checks were not among the checks that you accounted in making up the living expense account.

A. They were not checks drawn on his personal bank account, no, sir. I didn't state that. But they were a part of the cash available to him.

The Court: In other words, if you couldn't trace the money to bonds or to some place else you said, well, that is living expenses?

The Witness: Yes, that is available.

The Court: He spent it for living expenses?

The Witness: Yes.

The Court: That is what you did for that, you didn't trace that or tie them onto any bond purchase or any other place so you just said that is living expense?

The Witness: That is exactly correct.

The Court: So if they were used, however, for the purchase of bonds you would have to revise your figures, wouldn't you?

The Witness: That is exactly right, your Honor.

Q. (By Mr. Robnett): And it would change, would it not, the amount of unreported taxable income that you have set up for 1943?

A. It would as to the purchase of the bonds and it would be a reduction of the amount shown as used for personal expenses. That would be the effect of this knowledge that I have now that I did not have at that time.

(Testimony of J. Bryant Eustice.)

Q. Would it not also reduce——

The Court: And reduce your total sum over here in your comparative net worth by that amount, the return would have to be adjusted and reduce your corrected income on the 1943 tax?

The Witness: That is right, your Honor. We have \$1332——

The Court: I understand. If it is yes, that is yes.

The Witness: It is yes, your Honor.

The Court: All right.

Mr. Robnett: Your Honor, I will ask to have this check marked as the exhibit next in order.

The Clerk: Z.

(The document referred to was marked Defendants' Exhibit Z for identification.)

Q. (By Mr. Robnett): Mr. Eustice, I will show you Exhibit Z, which is a check of Sam Ormont made payable to Sam Ormont dated 1-9-1943, drawn on the Huntington Park Branch of the Security-First [659] National Bank of Los Angeles, endorsed by Sam Ormont and stamped paid with the perforated stamp. I will ask you to examine that. It is for \$595.25. Did you ever see that check before?

A. Yes, sir, I believe that is one of the items I read off to you here.

Q. That is one of the items that you charged as living expense, isn't it?

A. Considered as living expenses, yes, that is correct.

(Testimony of J. Bryant Eustice.)

Q. You at no time connected that up with the purchase of \$7000 worth of bonds, did you?

A. I did not.

Q. You didn't give any credit for him having that check available and the funds therefrom available for the purchase of those \$7000 worth of bonds?

A. No, I considered it as available for personal living expenses.

The Court: When you say "available" there you mean available for and used as?

The Witness: That is correct, your Honor.

Q. (By Mr. Robnett): And in connection with used as, you merely assumed it was used as, did you not?

A. Merely assumed that it was used as.

Mr. Robnett: I offer that in evidence. [660]

Mr. Strong: No objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Defendants' Exhibit Z.)

Q. (By Mr. Robnett): Now, in connection with Mr. Ormont's living expense, didn't you know that during all these years that are involved, that is, '42, '43 and '44, Mr. Ormont lived at his mother's home which she owned?

Mr. Strong: I object to that. That assumes a fact not in evidence.

The Court: Objection overruled. The witness has testified that he assumed he spent certain money for living, and if he thought it was more than he might have spent.

(Testimony of J. Bryant Eustice.)

The Witness: May I have that question?

Mr. Strong: But this, your Honor, assumes that his mother owned the home. There is no evidence as to that whatsoever.

The Court: Objection overruled.

(The question referred to was read by the reporter as follows:

(“Q. Now, in connection with Mr. Ormont’s living expense, didn’t you know that during all these years that are involved, that is, ’42, ’43 and ’44, Mr. Ormont lived at his mother’s home which she owned?”) [661]

The Witness: No; that is no to that question in general.

Q. (By Mr. Robnett): Have you a record in your records there to that effect, that Mr. Ormont’s mother did not own her own home and that he lived with her?

A. I am referring to the statement by Mr. Ormont to myself during the examination.

Q. You were told then, were you not, by Mr. Ormont that during those years he did live with his mother at her home?

A. That is not what he told me; no, sir.

Q. What did he tell you in that regard?

A. That he had supplied most of the funds for the purchase of that home himself and in fact it was his home.

Q. Will you show me your notes on that?

A. I don’t know that I have any notes. Do you

(Testimony of J. Bryant Eustice.)

have any particular ones you want me to refer to?

Q. I will refer to some, not on that, though, to prove what you said.

Mr. Strong: I don't think such argument ought to go on.

The Court: That is correct. The jury is instructed to disregard counsel's remarks.

Mr. Robnett: Do you want to see this, counsel?

Mr. Strong: No, I don't think so. [662]

Q. (By Mr. Robnett): Showing you Exhibit 40, the pages not being numbered but I am showing you one in which you have at the top "interview with Sam Ormont, 11-27-45," and I will ask you if you will read the first line of your notes there down to the period that I indicate on the second line after the word "ago." Will you read those out loud?

A. Do you want me to read the whole thing?

Q. No, read to where I tell you, to the period on the second line.

A. "Sam Ormont stated that his mother owned home and that she had purchased same about 20 years ago."

Q. Is that "20" or "28" years ago?

A. 28.

Q. Did he so state to you or did you make this entry without him stating it?

A. I would say that that being a note that I made at the time or immediately after that conference, that that must have been what he stated or I wouldn't have written it down there.

(Testimony of J. Bryant Eustice.)

Q. Now, then, as a matter of fact he did tell you that his mother owned the home and that she bought it 28 years before that, didn't he?

A. That is that particular part of that paragraph that you had me read; yes. [663]

Q. Wait a minute. I am asking you to state, after refreshing your memory from these notes that I have just had you read, I will ask you if it isn't a fact that Mr. Sam Ormont told you that his mother owned the home and that she purchased it about 28 years ago.

Mr. Strong: Your Honor, I object. The witness indicated——

The Court: Objection overruled. The witness can answer the question without arguing it.

We would make a lot more progress, too, Mr. Eustice, and you wouldn't be on that witness stand so long if you just answer the questions. Whether or not this man is guilty, or these men are guilty, the law has taken that out of your hands to decide and put it in the hands of the jury and the court. And it gives the duty upon the District Attorney to argue the facts. If you will just answer as briefly and frankly as possible without arguing your point——

The Witness: I see, your Honor. Even though it does not explain the whole matter?

The Court: I will determine if it puts you in a false light. If it does then I will give you an opportunity to explain. But there is a difference be-

(Testimony of J. Bryant Eustice.)

tween putting you in a false light and putting your contentions in a false light.

The Witness: Well, I would say the answer is yes as to the choice of the two. [664]

The Court: What do you mean, the choice of the two?

The Witness: Yes or no.

The Court: You mean to say that the answer is yes or do you mean that it is no? Is that what Sam Ormont told you or isn't it? You stated a few moments ago that he told you that he bought the home and that it was really his home. Now which is your answer, Mr. Witness? You know what we are driving at.

The Witness: Yes, he told me.

The Court: Did he tell you both things?

The Witness: Yes, he gave me further explanations of it which I have not been allowed to bring out.

The Court: He told you both things?

The Witness: That part of it, that the home was in the name of his mother, is correct, and that his mother purchased the home, she purchased it in her name.

The Court: 28 years ago?

The Witness: 28 years ago.

The Court: Then he also told you that he bought the home and that it was actually his?

The Witness: That he worked and made payments on the home out of his earnings.

The Court: And that it was actually his?

(Testimony of J. Bryant Eustice.)

The Witness: I believe there is another document——

The Court: No, not what the document is, what did he tell [665] you?

The Witness: Well, it is actually his mother's, it is in his mother's name.

The Court: All right.

Q. (By Mr. Robnett): You made no note whatsoever in your work sheets, did you, of what you say he told you about him making payments on the home? Just answer that yes or no.

The Court: Examine the documents, if you want to.

The Witness (Examining document): No further notes on that.

Q. (By Mr. Robnett): I don't believe I have asked you about this Exhibit X, United Dressed Beef Company check for \$204.75, as to whether or not you gave any consideration as to Sam Ormont having those funds available with which to purchase those \$7000 worth of bonds.

The Court: What date is that check?

Mr. Robnett: That is dated December 11, 1942, and stamped paid, with a perforated stamp, 1-11-43.

The Witness: I did not consider that as money used for the purchase of bonds; no, sir.

Q. (By Mr. Robnett): That was another item, was it, that you merely considered was available to Mr. Ormont as living expenses? [666]

A. Available for living expenses; yes, sir.

Q. Now, if that check and the checks, the eight

(Testimony of J. Bryant Eustice.)

\$100 checks, or \$800, and the \$595.26 check, which are in evidence as Exhibits Q and Y and Z——

The Court: Let me see now. You just asked him about Exhibit Q. That is the check with the picture of a steer on it?

Mr. Robnett: Yes.

The Court: That is only in for identification. The witness just now testified—you saw the check and did not take it into consideration, was that your testimony, that you saw the check.

The Witness: No, your Honor.

The Court: You have never seen the check before?

The Witness: I have seen some of these checks but I did not see all of them.

The Court: Let us find out about that.

The Witness: I knew what the total amount was that was received from interest.

Mr. Robnett: He just testified, your Honor, that he did take it into account as part of the living expenses.

The Court: Of 1942. That is what I understood him to say just now.

Mr. Strong: I will agree to it going into evidence, just to save time. [667]

The Court: You objected this morning. Your objection was good.

Mr. Strong: Yes, but just to save time I will let it in.

The Court: It isn't a matter of convenience, it is a matter of right. He is either entitled to have

(Testimony of J. Bryant Eustice.)

it introduced or not. If you have an objection that you think should be made, you should make it.

Mr. Robnett: I will offer it in evidence.

The Court: It is admitted in evidence.

(The document referred to was received in evidence as Defendants' Exhibit X.) [668]

Q. Now, I will ask you to examine Exhibits X, Y and Z, which you have already seen before, and I will also give you a piece of paper. I wish you would total all of those exhibits.

A. I make \$1600 of it.

Q. \$1600 even, do you not?

A. Yes, sir.

Q. Now, I will ask you if those checks embraced in this exhibit, totaling \$1600, were used by Mr. Ormont in purchasing the \$7000 worth of bonds in question here, then that would reduce, would it not, to that extent, \$1600, the amount that you claim as unaccounted for taxable income?

Mr. Strong: I object to that upon the ground that there is no showing that these checks were used to purchased these bonds at all.

The Court: He put it on a hypothetical basis.

Mr. Robnett: Correct.

The Court: That's the way I understood it.

Mr. Robnett: Yes, your Honor, I said if they were.

Mr. Strong: Same objection.

The Court: Objection overruled.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Will you answer that question yes or no, please?

A. Can I have the question again, please?

The Court: If they were used to buy bonds, would it reduce [669] the additional income? That's the effect of his question.

Mr. Robnett: Exactly; that he has charged as unaccounted for.

A. No, I don't believe so.

Q. It would not reduce it at all, is that correct?

A. That is correct. I don't believe it would reduce the ultimate computation of his income.

Q. Wasn't it your testimony that the reason that you charged \$2000 against Mr. Ormont as income that he had not paid on for 1943 was because, that on the purchase of the \$7000 worth of bonds, you only found a \$5000 check paid to purchase them, and it left \$2000 that you said was unexplained, and, therefore, you charged that \$2000 unexplained as taxable income against him?

A. Yes, it would reduce the taxable income, picked up from that source, that is correct.

Q. Then your answer would be yes, that it would have reduced that taxable income to the extent of the \$1600, on that item which you charge of \$2000, on the purchase of those bonds?

The Court: He just got through saying yes.

Mr. Robnett: Thank you.

Mr. Strong: Your Honor, I don't know whether he just got through saying yes to that same question. [670]

(Testimony of J. Bryant Eustice.)

The Court: I thought it was the same question.

Mr. Strong: May we have the witness answer it, just to make sure?

The Court: We have had too many questions repeated up to now. We have got to finish this trial. I don't mean to say that to be critical, Mr. Robnett. You have a duty to perform, and as long as the questions are appropriate under the law it is my duty to allow them to be answered.

Mr. Robnett: Thank you.

Going to an item you have testified to, I believe it was as to the purchase——

The Court: Are you coming to a new item?

Mr. Robnett: Yes, your Honor.

(Short recess.) [671]

The Court: Usual stipulation?

Mr. Robnett: Yes, your Honor.

Mr. Strong: Yes, your Honor.

Mr. Katz: So stipulated.

Q. (By Mr. Robnett): Mr. Eustice, you testified about an item of purchase of bonds in February, 1943, I believe the 15th of February, of \$750, which you said was unexplained funds, is that correct? A. Yes, sir; February 15, 1943.

Q. The total purchase price was \$750, was it not?

A. That is correct.

Q. And you said the total purchase price was unexplained funds, and that you charged it up as unaccounted for and unreported taxable income for 1943 of Sam Ormont. A. That is correct.

Mr. Robnett: May I have these two checks marked as the next exhibit?

(Testimony of J. Bryant Eustice.)

The Clerk: AA and BB.

Mr. Robnett: You can have the two as one.

The Court: If they are related, AA.

(The documents referred to were marked as Defendant's Exhibit AA for identification.)

Q. (By Mr. Robnett): I show you Exhibit AA, consisting of two checks of the Acme Meat Company to Sam Ormont, each for \$100, and ask [672] you to examine them and see if you have ever seen them before. A. I would said I had; yes.

Q. Do you have any record of those checks on your work sheets?

A. Not as individual checks; no, sir.

Q. Did you examine these during the course of your investigation and before you made your report? A. Yes, sir; I did.

Q. Did you at that time take into account the dates on these checks, the first one is dated 1-22-43, and it is No. 11,438, the other one is dated 1-29-43 and is No. 11,454. Did you consider those checks or the funds therefrom available to Mr. Ormont with which to purchase that bond, that \$750 bond?

A. No, I did not.

Q. What did you charge these up to?

A. I considered—could I see the checks again?

(The checks referred to were passed to the witness.)

The Witness: Well, either as funds of the Acme Meat Company deposited to his personal bank account or as funds available for personal expenses.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Did you consider those as withdrawal of capital or as income by him? [673]

A. As a withdrawal of capital.

Q. Now do you say that in the year 19—referring again to Exhibit Y, which consists of eight \$100 checks by the Acme Meat Company, and seven of them drawn in late '42 and the eighth one drawn on January 8, 1943—I believe you have testified that those checks, constituting \$800, you considered as funds available for his income or personal expenses?

A. Yes, that is correct; if they were not deposited to the bank account, to his personal bank account.

Q. Do you have a record to see whether or not they were so deposited?

A. I have a record of the total checks from the Acme Meat Company that were deposited to his personal bank account.

Q. Does that show the checks, the dates of the checks, or anything of that sort?

A. Oh, no, it wouldn't show the dates of the checks. It shows the checks coming from his business bank account and being deposited to his personal bank account. There was only a difference of \$506.09 in the amount that I show drawn and the amount that was deposited. We can't have all of these checks that are not deposited. What I mean, there is an end to it some place. [674]

(Testimony of J. Bryant Eustice.)

Q. Do you have any deposits dated about the 23rd day of January, 1943? I guess it's the 13th.

A. 13th of January. No, there are none on that date.

Q. I understood you to testify before recess that as to these particular checks, Exhibit Y, amounting to \$800, and also as to X, a check of the United Dressed Meat Company for \$206.75, and a check to Sam Ormont, on his personal account of \$595.25, totaling \$1600, that you credited them as to his living expenses or personal expenses?

A. Yes, as funds available.

Q. And you now say, as to Exhibit AA, that you did the same with these two \$100 checks?

A. Yes. I didn't pick them out individually, out of the totals.

Q. All of those checks you have just referred to, in Exhibit X, Y and Z, totaling \$1,600, and AA, totaling \$200, you will observe were all cashed or deposited in the month of January, 1943, is that correct?

A. Yes, that's correct, in 1943.

Q. So you attributed to his living expenses, for the month of January, 1943, that total amount of about \$1800, did you?

A. No, I didn't attribute any part of any particular month for living expenses.

Q. That was when he received them? You saw that, [675] didn't you? And you say you did attribute them to living expenses, and not funds with which to purchase bonds?

(Testimony of J. Bryant Eustice.)

A. Yes, the difference he drew from the Acme, and the amount he deposited to his personal bank account.

Q. I am referring to the ones, according to your charges, that were not available to purchase bonds, but they were available to charge to his living or personal expense account, isn't that what you said?

A. Yes, they would be considered so in the total.

Q. And you attributed that amount of money to his living, personal expenses, for the month of January, 1943, didn't you?

Mr. Strong: Objected to. The witness said he didn't.

The Court: He said he did not attribute them to the month. I think counsel might reserve that for his argument to the jury, rather than to the witness.

Mr. Robnett: Thank you.

Q. You testified concerning the \$1000 bond purchased in February. I don't know that I have it here. On this is 17 and a correction, 27. I don't know which is correct; either the 17th of February or the 27th of February, 1943?

A. There is one February 17, 1943.

Q. A \$1000 bond, wasn't it? A. Yes.

Q. And that bond was in the name of Sam Ormont and Sue [676] Kosdon, was it not?

A. That is correct, yes, sir.

Q. Did you attempt to trace out from any source, of Sue Kosdon's accounts, whether or not she paid any sum on that bond?

A. The answer is no.

(Testimony of J. Bryant Eustice.)

Q. You did not? A. No, sir.

Q. You charged the entire purchase price of that bond against Mr. Ormont, did you?

A. I didn't take any part of this into income, if that is what you are referring to.

The Court: Just answer the question.

Q. (By Mr. Robnett): Did you charge it to Mr. Ormont—the cost of that bond?

A. I really don't know what you mean.

Mr. Strong: I object——

The Court: Objection overruled. Did you assume it was Sam Ormont's money?

The Witness: I assumed that it was his money, and that it was his bond, yes, that was purchased.

Q. (By Mr. Robnett): You never talked to Sue Kosdon about it at all, did you?

A. No, I talked to Sam Ormont. [677]

Q. Had you charged the whole price of that bond to him?

The Court: He just answered that.

Mr. Robnett: All right. Thank you.

Now you testified also—I believe you did at least—as to a check that you found from Mr. Ormont's records to either Mr. Kosdon or Mrs. Kodson, did you not?

A. Yes, this was a check, I believe, this particular check was made from the personal bank account payable to Benjamin Kosdon, if I recall correctly.

Q. For \$750? A. That is correct.

(Testimony of J. Bryant Eustice.)

Q. Did you charge that \$750 as a loan to Mr. Kosdon or did you charge it up against Mr. Ormont as income?

A. I didn't charge any part of it as income; no, sir.

Q. How did you handle the transaction?

A. I considered it as funds available to purchase this particular bond, and so applied it.

Q. You applied it on that particular bond?

A. Yes, sir.

Q. Now did you find any record of a repayment of that \$750 by Mr. Kosdon to Mr. Ormont?

A. No, sir, I did not.

Q. Did you trace out a bond that was, or bond checks that were received, in the name of Mr. Kosdon for \$750 and some 64 cents that were transferred to Mr. Ormont? [678]

Mr. Strong: Objected to on the ground that there is no evidence that that is so.

Mr. Robnett: I am asking if he did trace out any such checks.

Mr. Strong: There is no evidence that there are such checks.

The Court: I take it that counsel is asking if he looked for any such check. I don't quite understand the question. Do you understand it?

The Witness: I believe he is asking me if I found a check from Mr. Kosdon to Mr. Ormont for \$750.

The Court: Is that what you want to know?

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Not exactly that, your Honor. I am asking him if he examined the sale of a bond by Mr. Kosdon.

The Court: If he found the sale of a bond?

Mr. Robnett: Yes, if he found any records where Mr. Kosdon had received the cash for a government bond in the sum of \$750.64.

The Witness: No, sir, I wasn't inquiring into Mr. Kosdon's bonds.

Q. (By Mr. Robnett): You didn't go any further to find out whether that particular bond that was in the name of Sam Ormont and Sue Kosdon had ever been cashed?

A. I do not know if it has been cashed; no, sir.

The Court: Would that have made any difference in your calculations?

The Witness: It may have, your Honor.

Q. (By Mr. Robnett): You have testified, I believe, concerning a Series G bond for \$1,000 that was purchased in April, 1943.

A. April 22, 1943.

Q. The record shows April 12.

A. There was one April 12.

Q. A \$1,000 bond?

A. A \$1,000 bond.

Q. Now as to that bond, did you charge any of the cost of that bond to Mr. Ormont as income of unexplained funds?

A. Yes, sir; all of it.

Q. Do you have any record of a purchase of a similar bond, a \$1,000 bond, as of April 3, 1943?

A. No, I do not.

(Testimony of J. Bryant Eustice.)

Q. Your record does not indicate the date that the bond bears, does it?

A. Yes, it shows the date issued, the date purchased.

Q. It wouldn't show the date of the application necessarily, would it?

A. I don't believe it would necessarily.

Q. All right. That particular bond there that you say is for April 12, is that right? [680]

A. April 12, 1943.

Q. Was bought in the name of Sam Ormont and Mrs. Dora Goldberg, was it not?

A. Yes, sir.

Q. The cost of the bond was \$1,000?

A. \$1,000.

Mr. Robnett: I would like to have this marked as the next exhibit, please.

The Clerk: BB.

(The document referred to was marked Defendant's Exhibit BB for identification.)

Mr. Robnett: And this check marked also.

The Clerk: CC.

(The document referred to was marked Defendant's Exhibit CC for identification.)

Q. (By Mr. Robnett): I am going to ask you if, as to that \$1,000 bond, if you charged the entire cost of that as income of Sam Ormont because of unexplained funds.

A. That is correct.

(Testimony of J. Bryant Eustice.)

Q. And as taxable income too, did you?

A. Yes, taxable income.

Q. Did you make any search whatever of Mr. Ormont's bank account to determine whether or not he had paid any part of that bond from his bank account? [681]

A. Yes.

Q. What does your report show that you found, Mr. Eustice?

A. You mean from his personal checking account?

Q. Yes, personal checking account.

A. Well, I didn't find anything that I applied to the cost of that bond.

Q. You didn't find anything at all?

A. No, sir.

The Court: He didn't find anything to apply.

Mr. Robnett: Thank you.

Q. I now show you Exhibit BB and ask you to examine it. It is an application for United States savings bonds, Series G, and it's to be issued in the name of Mr. Sam Ormont or Mrs. Dora Goldberg, giving the address as 407 North Cornwall Street, it looks like, Los Angeles, Cal., bearing date 4-3-43, and I will ask you to examine that.

A. Yes, sir, it is as you state.

Q. That is for a \$1000 bond, isn't it?

A. That is correct.

Q. And that corresponds, although it is a few days earlier, to the application for \$1,000, which you have testified to, of April 12, 1943, doesn't it?

A. Yes, it corresponds in amount to that bond.

(Testimony of J. Bryant Eustice.)

Q. In your opinion that probably is the application for that bond?

Mr. Strong: That is objected to.

The Witness: It could be, yes.

The Court: What is that?

Mr. Strong: I object to a question based upon opinions concerning these matters.

The Court: That is all he has been expressing.

Mr. Strong: Not as to documents he has never seen before, your Honor. [683]

The Court: He has expressed his opinions here pretty considerably.

Mr. Strong: On the basis of what he examined. He has never seen that document.

The Court: Do you have any record of any other bond being purchased on or about that date?

The Witness: No, sir.

Mr. Robnett: I offer it in evidence, if the Court please.

Mr. Strong: No objection.

The Court: Admitted.

(The document referred to was marked as Defendant Sam Ormont's Exhibit BB and was received in evidence.)

Q. (By Mr. Robnett:) I show you Exhibit CC, which is a check dated 4-3-43, being check No. 13, drawn on the Huntington Park Branch of the Security First National Bank of Los Angeles, by Sam Ormont, for \$249.26, and ask you to examine it.

A. Yes, sir.

(Testimony of J. Bryant Eustice.)

Q. Did you ever see that check before?

A. I must have seen it, yes, sir.

Q. You must have seen it? Did you take that check into account as being funds that were used on account of the purchase of the bond of \$1000 that you have testified to, as of April 12, 1943?

A. No, I did not. [684]

Q. You did not? What did you do after you examined this check, with regard to what application you made of it?

A. I have an indication here that it could have been used on the purchase of the bond, but I didn't identify any other corresponding item to go with it, so it was not taken into account or applied to any of these bonds.

Q. It was not applied to the purchase of any bonds? It wasn't taken into account at all?

A. No, not on the purchase of any bond.

Q. Did you consider this as a part of Mr. Ormont's living and personal expenses?

A. It must have got in there—yes, it would have gotten in there as a part of that, because I took the total expenditures that he had made, less the expenditures for other purposes, and considered the balance for personal——

The Court: When you said yes that answered the question. A. Yes.

The Court: You have said the other so many times.

The Witness: Yes, sir.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: I offer this in evidence, if the Court please.

The Clerk: CC.

The Court: Admitted.

(The document referred to was marked Defendant Sam Ormont's Exhibit CC and was received in evidence.) [685]

Q. (By Mr. Robnett): You observed, did you not, that the check was made by Sam Ormont, and was payable to the Treasury of the United States?

A. Yes, sir.

Q. And yet you put it over into his personal expenses?

The Court: You can argue that question.

Mr. Robnett: All right. I would like to have these checks marked as the next exhibit. They are three.

The Court: All of them as one?

Mr. Robnett: Yes.

The Clerk: DD.

The Court: How many checks?

Mr. Robnett: Three.

(The documents referred to were marked Defendant Sam Ormont's Exhibit DD for identification.)

Mr. Robnett: I will now show you Exhibit DD, consisting of three checks of the Acme Meat Company to Sam Ormont. They are all dated in Feb-

(Testimony of J. Bryant Eustice.)

ruary, 1943. I will ask you to examine them. Have you seen those checks before?

A. I will say I have.

The Court: (To Mr. Strong) Have you seen these?

Mr. Strong: No.

Mr. Robnett: I am sorry. I am getting in a hurry again.

(Shows checks to counsel.)

Mr. Strong: That is all right. I was wondering if they were the same kind. [686]

Q. (By Mr. Robnett): You have seen those before, you say?

A. Yes, I would say I have seen those checks before.

Q. And when you examined the books and records and made your report of this matter, did you take those three checks into account as funds available to Mr. Ormont or the purchase of bonds or payment on account of purchase of any bonds?

A. No, I did not.

Q. What did you do with them or charge them up to?

A. Well, I considered them as drawing from his personal—I mean from his business bank account there.

The Court: As unexplained funds?

The Witness: No, your Honor. Possibly these got into funds that went into his personal bank account. I don't know without looking.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Robnett): Did you charge them up as withdrawal of capital from the Acme Meat Company by Sam Ormont?

A. Yes, I considered them such. That is what they were, withdrawals from capital.

Q. You didn't consider them income at all?

A. No, sir.

Mr. Robnett: Your Honor, I want to start another matter. I believe you said you intended to adjourn at 4:00 o'clock. [687]

The Court: Do you think you could finish the other matter in five minutes?

Mr. Robnett: No, I do not. That is why I mention it to your Honor.

The Court: Very well. We will recess until 10:00 o'clock tomorrow morning. Remember the admonition.

And it may be stipulated, counsel, that where I have neglected to advise the jury to remember the admonition that they may be deemed to have been admonished, and that they will be deemed to have been admonished?

Mr. Robnett: So stipulated.

Mr. Strong: So stipulated.

Mr. Katz: Yes, your Honor.

The Court: 10:00 o'clock tomorrow morning.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, June 4, 1947.)

Los Angeles, California, June 4, 1947

10:00 o'Clock A.M.

The Court: Ex parte?

The Clerk: Yes, your Honor.

(Other court matters.)

The Court: Any other ex parte matters?

The Clerk: That is all. Further trial.

The Court: United States v. Ormont and Him-
melfarb. Usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Katz: So stipulated.

The Court: Mr. Eustice.

J. BRYANT EUSTICE

the witness on the stand at the time of adjourn-
ment, resumed the stand and testified further as
follows:

Cross-Examination

(Continued)

By Mr. Robnett:

Q. Mr. Eustice, I will put before you Exhibits
1, 2 and 3 in this case, which are income tax returns
in connection with Mr. Ormont's income. I wish
you would kindly refer now to the 1943 return,
which I believe is No. 3. A. No. 2.

Q. No. 2, yes. All right. That is the 1943 per-
sonal return, isn't it? [692] A. Yes, sir.

Q. I will ask you to turn to the back page of
that, to item 19, the item under 19. That was the
cancellation of tax, or what they call the forgive-
ness feature, isn't it? A. Yes, sir.

(Testimony of J. Bryant Eustice.)

Q. And the item there was \$2477.91, of which 75 per cent of it was \$1858.44 is the forgiven part, isn't that correct? A. That is correct.

Q. On the return? A. Yes, sir.

Q. Did you in any manner in your calculations of Mr. Ormont's 1943 return change that \$1858.44?

A. Yes, I did.

Q. Did you decrease it or increase it?

A. I decreased it, eliminated the forgiveness feature altogether.

Q. I beg your pardon?

A. I eliminated the forgiveness feature altogether.

Q. Altogether? A. Yes, sir.

Q. And therefore that increased the tax as you calculated it for 1943 to the extent of \$1858.44, did it not? A. Yes, sir, it would.

Q. You made absolutely no deduction on your calculations [693] and in arriving at the tax that you have claimed he owed for 1943, you made no deduction whatsoever for any cancellation of tax that was granted in 1943?

A. That is correct; no allowance of any forgiveness feature.

Q. Now on your calculations of the 1943 tax you had, instead of the amount reported by Mr. Ormont and paid by him for that year, how much additional tax that you claimed he owed for 1942?

A. How much additional for 1942?

Q. Yes, over the amount that he accounted for and paid. A. \$1397.93.

(Testimony of J. Bryant Eustice.)

Q. And what did it make—pardon me just a minute—1300 and how much? A. \$1397.93.

Q. That would be what you claim was additional tax for that year? A. Yes, sir.

Q. Which made, as you calculated it, the total tax for 1942 of how much? A. \$3875.84.

Q. \$3875.84? A. That is correct.

Q. As against the tax that he accounted for and paid of \$2477.91, is that correct?

A. Yes, sir, that is the tax he reported. [694]

Q. Now, refer if you will, please—I will give you Exhibit 6, and ask you to examine that.

A. Yes, sir.

Q. You have seen that before, haven't you?

A. Yes, I have.

Q. And that is the partnership return of income for 1944, or the fiscal year beginning May 1st, 1944, and ending April 30, 1945, is it not?

A. That is correct.

Q. And it is of Sam Ormont and Phillip Himelfarb? A. That is correct.

Q. And it shows a total income that they reported as \$71,388.84?

A. Yes, sir, that is correct.

Q. In your calculations of the 1944 tax of Sam Ormont, did you use this return of which Exhibit 6 is a photostat? A. No, sir, I did not.

Q. Did you refer to it at all?

A. Well, I referred to it, but I didn't enter it into my computation.

Q. You didn't at all? A. No, sir.

(Testimony of J. Bryant Eustice.)

Q. In no manner? A. No, sir.

Mr. Robnett: Mr. Strong has been kind enough, at my [695] request, to give me a photostatic copy of the individual tax return of Sam Ormont for 1945, which I would now like to have marked the next exhibit.

The Clerk: EE.

(The document referred to was marked Defendant's Exhibit EE for identification.)

Mr. Robnett: And counsel has agreed that I may put it in evidence.

Mr. Strong: That is correct.

Mr. Robnett: As EE.

The Court: In evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit EE.)

Q. (By Mr. Robnett): I now show you Exhibit EE in this case, which is an individual income tax return for the year 1945 by Sam Ormont, and ask you if you have ever seen the original of that? A. I don't believe I have, no, sir.

Q. You did not ever see it? A. No, sir.

The Court: Did you ever see a photostatic copy or a copy?

The Witness: I don't recall that I have, your Honor. It was not part of my examination.

Q. (By Mr. Robnett): In making your calculations for 1944 you did know, [696] that the partnership or joint venture return of Sam Ormont and Phillip Himmelfarb for the fiscal year com-

(Testimony of J. Bryant Eustice.)

mencing May 1st, 1944, and ending April 30, 1945, of an aggregate income of \$71,388.84, had been filed before you completed your report?

A. Yes, sir, I knew that.

Q. You knew that? And you also knew, did you not, that the report divided the sum of \$71,388.84 equally, and allocated exactly one-half of that to Sam Ormont as his portion of that income?

A. Yes, sir, that is correct.

The Court: You say you knew that?

The Witness: Yes, your Honor, I knew that.

Q. (By Mr. Robnett): You also knew from that, did you not, that the income represented in that report for that fiscal year from May 1st, 1944, and ending April 30, 1945, embraced eight months of the year 1944?

A. That is correct, that covers eight months of 1944.

Q. Did you, in your 1944, include in your calculations income of Sam Ormont from that source, or any source during those months from May 1, 1944, to and including December 31, 1944?

A. Yes, sir, I did. [697]

Q. You took into consideration a part of the income then for those eight months of this \$35,-694.42 referred to in this Exhibit 6, you took a part of that into consideration as 1944 income, did you?

A. Yes, part of that was included in the——

Q. Can you tell me——

Mr. Strong: The witness hasn't finished, your Honor.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Pardon me.

The Witness: I said, yes, part of it was included in the 1944 return.

Q. (By Mr. Robnett): Can you tell me now how much of that \$35,694.42 shown in Exhibit 6 as being allocated to Sam Ormont as his portion of that income was taken into account by you in fixing the amount of income of Sam Ormont that you claimed was 1944 income?

Q. It would be my total adjustment, less the amount of additional income that I picked up for the four preceding months. That would, I say, in even amounts be about \$5000.

Q. Which would amount to about that?

A. That I picked up in my computation about \$5000 addition income from January 1, 1944, to May 1, 1944.

Q. Around \$5000 for those four months?

A. Yes, sir.

Q. Then all the balance of the income that you calculated [698] for Sam Ormont for 1944 was the income referred to in Exhibit 6, wasn't it?

A. That could explain the source of that income, that it was what he reported on Exhibit 6.

Q. Now will you tell me what was the total income you calculated for Sam Ormont for 1944, taxable income I am referring to.

The Court: The gross?

Mr. Robnett: Yes, the gross taxable income.

The Court: Gross income?

(Testimony of J. Bryant Eustice.)

The Witness: The net income. We have been talking about net income.

Q. (By Mr. Robnett): This item I believe was net income and I want to eventually get to the net income. I think we can go directly that way instead of going to the gross. Give me what you found as the net taxable income.

A. The corrected net income was \$36,982.52.

Q. \$36,982.52? A. Yes, sir.

Q. Now that was not the amount you found was unaccounted for but that was the total that you determined was a taxable income for that year, was it? A. Yes, sir; that is correct.

Q. And how much did you find that Mr. Ormont accounted [699] for for the year 1944?

A. \$12,174.57.

Q. I will ask you to look at Exhibit EE, which is Mr. Ormont's 1945 income tax return, and tell us what you find there as to the total net income reported by Mr. Ormont for that year.

A. He shows \$62,458.59. That is the adjusted gross income.

Q. What did you say?

A. His adjusted gross income for 1945—well, it is approximately the same.

Q. You mean the net income is approximately the same as the adjusted gross?

A. Yes, in this case.

Q. All right. Now what do you find from that that he reported as the total tax payable by him for the year 1945? A. \$37,301.46.

(Testimony of J. Bryant Eustice.)

Q. Now, Mr. Eustice, do you have one of the Government pads there that we might use freely?

A. I have one here.

Q. Before I get to that, one other question: Does not that 1945 report, which is Exhibit EE, show the income of Sam Ormont from the Acme Meat Company separately from the income of Sam Ormont from the joint venture with Phillip Himmelfarb?

A. I guess I got the wrong one.

Q. Yes, better look at Exhibit EE.

A. Yes, sir; separately. [701]

Q. And how much does it show from the Acme Meat Company's and Mr. Ormont's income?

Mr. Strong: I have not objected to this reading from documents in evidence, but the document is in evidence, and I don't see any particular purpose in having the witness constantly reading from it.

The Court: It is cross examination of the witness. I think it is proper, and these questions are preliminary to some other questions.

The Witness: The net income is \$25,364.17, from the Acme Meat Company.

Q. (By Mr. Robnett): How much from the joint venture?

A. \$35,694.42.

Q. Now, Mr. Eustice, I will ask you this: As an expert in calculating income taxes, is it not a fact that had Mr. Ormont accounted and reported the income for 1944 in the manner, which a large portion of it, as you claim, would have been embraced in Exhibit 6, in the manner in which you have

(Testimony of J. Bryant Eustice.)

calculated it, if it isn't true that then it would have reduced the amount of income reportable by him and payable by him in 1945 to the extent that you have testified, of something over \$30,000?

The Court: Did you understand the question? I don't follow it. [702]

Mr. Strong: I don't either.

Mr. Robnett: I am sorry, your Honor.

The Court: It has to be simple for me to understand.

Mr. Robnett: I don't think so at all. I think it is very confusing, perhaps. I had in mind what I wanted, but didn't express it.

Q. In other words, you have said that of all but about \$5,000 of the amount you claim he should have reported on in 1945,—you took that, and it was the same as he reported, not in amount, but it was embraced in Exhibit 6.

The Witness: What is Exhibit 6, if you please?

Mr. Robnett: I beg your pardon.

The Witness: I don't have Exhibit 6.

The Court: Himmelfarb and Ormont.

Mr. Robnett: That is the joint venture.

The Court: Do you have Exhibit 6 there?

Mr. Robnett: Pardon me. I have it. I will re-frame the question.

Q. All but about \$5,000 of Mr. Ormont's income for 1944, which you had calculated, of which \$5,000 or thereabouts was for the year 1944——

A. Yes, sir.

(Testimony of J. Bryant Eustice.)

Q. All the balance of it which you calculated would be embraced in Exhibit 6?

A. I believe that is correct. [703]

Q. I want to ask you if, as a matter of fact, supposing Mr. Ormont had reported his income, as you have figured it, for 1944, then, is it not true that in his 1945 income report, his income, his taxable income would have been reduced in an amount of approximately \$24,000?

A. It would have been reduced by the amount of the tax. I can explain it.

Q. Go ahead.

A. My additional income adjustment for 1944 was \$24,807.95. The amount of that figure I determined to represent income prior to May 1st, 1944, was \$5,550.19. Deducting that from my adjustment of 1944 of \$24,807.95, there would be a balance of \$19,257.76.

Q. \$19,257, and how many cents?

A. .76. I believe the answer to your question is, if this amount, which was included in the joint venture return, had not been reported in Mr. Ormont's 1945 income tax return, his tax for that year would have been reduced by the amount of income tax on the additional \$19,257.76.

Q. That isn't exactly it. I think it comes around the other way, perhaps. What I am asking is this: By including that nineteen thousand in his 1944 report, saying he had it filed as you say, it would necessarily be taken off of his income of 1945, then, wouldn't it, that amount of \$19,257.76?

(Testimony of J. Bryant Eustice.)

Mr. Strong: I object to that upon the ground that there [704] is no showing that the nineteen thousand is the same as that reported. It may be entirely different.

The Court: Objection overruled. It is a hypothetical question. Do you remember the question?

The Witness: No, your Honor.

The Court: Read it, Mr. Reporter.

(Question read by the reporter.)

A. That is correct. That amount of income would then be taken off of his 1945 individual return.

Q. And it, of course, reduced his tax for 1945?

A. Yes, by the tax on that amount.

Q. I will ask you this: Assuming that he had that reported, that \$19,257.76, as additional income in 1944, which, as you say, in return would have reduced his 1945, is it not a fact that the joint tax that he would have paid, that is, the aggregate tax, I should say, for 1944, and 1945, would have been \$3,000 less than the way he did report those items, and did pay, in 1944 and 1945?

A. Yes, it would have been less, because he was in a higher tax bracket in 1945.

The Court: What do you want the witness to do now?

Q. (By Mr. Robnett): I would like to have you make, if you will, your own calculations for 1944. You have those figures already, I assume, have you? A. What his tax is for 1944?

(Testimony of J. Bryant Eustice.)

Q. What you claim it is.

The Court: What you claim it is for 1944.

The Witness: Yes, what I claim it is, your Honor.

Q. (By Mr. Robnett): You have that already figured? A. It is already figured.

Q. Now will you take the return of 1945 of Sam Ormont that is before you and take off of that——

The Court: \$19,259.76.

Mr. Robnett: 257.76, I believe. There is \$2 difference.

Q. Will you do that, please, and then calculate what his 1945 income tax would have been?

A. (Making calculation.) Yes, sir, I can give you the answer on that.

Q. All right. What is it?

A. In checking it back, I think it is correct; without having anybody check my computations I believe it is correct.

Q. What do you calculate there would have been as his 1945 tax? [706] A. \$23,524.59.

The Court: What was paid?

The Witness: The tax shown here was \$27,301.46.

Q. (By Mr. Robnett): Now will you take that figure, the \$23,000 plus that you have there, and add it to the tax as you calculated he should have paid in 1944. You have that all figured.

A. Add it to the tax?

Q. To this last item.

The Court: You claim his tax on the corrected net income was \$18,143.12. Is that the figure you want him to add?

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Yes, that would be it. Thank you, your Honor.

The Witness (making calculation): That is \$41,667.71.

Q. (By Mr. Robnett): That item would represent, would it not, according to the way you say these income tax should have been reported and paid, would represent his total income tax due and payable for the years 1944 and 1945?

A. Yes, sir.

Q. Is that correct? A. Yes.

Q. What was that figure again?

A. \$41,667.71.

Mr. Robnett: If the Court please, Mr. Strong has [707] agreed to stipulate with me that on or about March 15, 1945, Sam Ormont paid the sum of \$906.65 on his estimate of the income tax for 1945;

That on June 15, 1945, or thereabouts, he paid another \$906.65 on such estimate for 1945;

And on or about September 15, 1945, he paid the sum of \$17,153.35 on said estimate;

And on January 15, 1946, or thereabouts he paid \$11,933.35 on account of said 1945 estimated tax;

Making a total payment on such estimates of \$13,900.

Mr. Strong: So stipulated.

Mr. Robnett: I notice, Mr. Strong, that we have reported here 30 cents in addition to that.

Mr. Strong: I think the addition on \$13,900 was added away by 30 cents, but I don't think counsel is going to make a point of that.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: No, we won't.

Mr. Strong: That's the taxpayer's addition, not the Government's.

The Court: There seems to be something wrong with the Government's addition in some of these figures because the figures being quoted by the witness do not correspond by a few dollars or a few cents with these tables which you presented.

What are we waiting for now? [708]

Mr. Robnett: I am trying, your Honor—counsel didn't have the facts here for the further sum to be paid and I thought maybe I had the check here to show that it was made.

The Court: The total amount?

Mr. Robnett: Yes, the total amount that was paid.

The Court: Very well.

Mr. Robnett: Maybe I am incorrect, but if I am, correct me, but I understand that the record already shows that Mr. Ormont paid on his 1944 tax the amount he reported as due, namely, \$12,174.57.

The Court: No, that is the net income. He didn't pay \$12,000 in cash. [709]

Mr. Robnett: That is correct.

The Court: Let us see. You have here Sam Ormont's 1945 return?

Mr. Strong: Yes.

The Court: Is that EE?

Mr. Strong: Yes, your Honor.

(Testimony of J. Bryant Eustice.)

The Court: Let me see it a moment. Does this show the tax paid?

The Witness: The tax assessed, your Honor. It may show an amount paid on estimate.

The Court: I don't see any stamp here. \$37,301.

The Witness: May I see it a minute, your Honor? It shows \$30,900.30 was paid on the 1945 declaration of estimate, leaving a balance due of \$6401.16.

The Court: Is that the check you are looking for?

Mr. Robnett: That is the check, your Honor.

The Court: Have you got it?

Mr. Kosdon: No your Honor.

The Witness: This says: Received with remittance, March 16, 1946.

The Court: That would be——

Mr. Strong: Some evidence.

The Court: It would be a presumption that it was paid. In other words, the presumption is that the law was performed, and whoever put the stamp on here got the money before that [710] and that he paid the sum, the presumption is, of \$37,000.

Mr. Strong: Unless we dispute subsequently that it was paid.

The Court: At this stage, the presumption is that \$37,301.46 was paid by Sam Ormont for his 1945 tax, on March 15, 1946.

Q. (By Mr. Robnett): Assuming now that all of the taxes as reported by Mr. Ormont for 1944 and 1945 were paid, is it not a fact, Mr. Eustice,

(Testimony of J. Bryant Eustice.)

that the amount so paid by him was as much or more than the tax he would have owed had he accounted for those two years in the manner in which you say he should?

A. That is, without taking into consideration the \$5,550.19, which was not accounted for on the joint venture return, and therefore, not added.

The Court: No, his question is: Not taking that into account. All he wants now is the total of the figures of your calculation of the amount actually paid, that is \$37,301.46, plus the \$3,626.58; is that correct?

The Court: If that would not be more than the sum you calculated on the adjusted income as the sum you claim for 1944?

The Witness: It would have left this figure, I referred to, out of this computation.

The Court: You left that out? But take it on the basis [711] that counsel has asked now, that is \$19,257.56 off his income, you calculated his tax to be \$2,554.49?

The Witness: I see.

The Court: But he says to leave that \$19,000, and assume 1944 just the same as you claimed, his total tax due would be \$18,143.12, is that right?

The Witness: Yes, sir, \$18,143.12.

The Court: His question is, the tax he actually paid in 1945, and the tax he actually paid in 1944, taken together, exceed the amount you claim is due for 1944, and the amount that would have been due in 1945, less the \$19,000?

(Testimony of J. Bryant Eustice.)

The Witness: I believe it would. We haven't added them together.

Q. (By Mr. Robnett): Can you calculate it there quickly? I don't want to take up too much time.

The Witness: The figure, I believe, your Honor, is on that.

The Court: I beg your pardon. It is \$37,301.46. It is simply the addition of \$37,301.46 and \$3,626.58, isn't it?

The Witness: What figure?

The Court: You say here: Tax disclosed per return, \$3,626.58 for 1944.

The Witness: Yes, that is correct, your Honor. That is \$40,928.04. [712]

Q. (By Mr. Robnett): And that is as much or more, is it not, than the amount you claim he should have paid in 1944?

A. The other figure we had was \$41,667.77.

The Court: Or \$47,301.46 difference, about?

The Witness: Yes.

Mr. Strong: I understand this is all based on an assumption.

The Court: That is correct, based on the assumption that the 1945 return did include the \$19,259.76, which the witness says he put into the 1944 return.

Mr. Strong: But he did not say it was the same sum.

Mr. Robnett: Pardon me, your Honor, but I understood the evidence of the witness was to the

(Testimony of J. Bryant Eustice.)

effect that Exhibit 6 did include the nineteen thousand plus of income that he calculated in his calculations on the 1944 of Sam Ormont. It was not an assumption at all.

The Court: Exhibit 6 is——

Mr. Robnett: That is the joint venture return, showing \$35,000.00, something like that, to Sam Ormont, for that fiscal year from May 1st, 1944, to April 30, 1945. [713]

Mr. Strong: Your Honor, that was why I objected, that it is not the same sum.

The Court: I do not know that it did that. In any event, the witness has testified that \$19,000—whatever this figure is—of his adjusted increase for 1944 was income from that partnership, or joint venture.

The Witness: I can explain that, your Honor. I took into account this sum of \$19,257.76. I don't know of my own knowledge where it came from. The taxpayer, Mr. Ormont, told me that this additional income was income that he had received from the joint venture.

Q. (By Mr. Robnett): Now one other matter——

The Court: Excuse me. Mr. Strong has a matter in another court at 11:00 o'clock, so we will have the recess now. Remember the admonition.

(Short recess.)

The Court: Usual stipulation?

Mr. Strong: Usual stipulation.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Yes, your Honor.

Mr. Katz: Yes, your Honor.

The Court: Very well.

Mr. Robnett: I would like to have this document marked as the next exhibit. It is our office copy. Counsel has agreed we may use it subject to them correcting it if necessary. [714]

The Clerk: FF.

(The document referred to was marked Defendants' Exhibit FF for identification.)

Mr. Robnett: I am informed that the original of this document which is now marked FF was filed with the Collector of Internal Revenue at Los Angeles, California, on or before March 15, 1945. Subject to checking, counsel has agreed that I may use this copy. We do not have the original here.

Mr. Strong: That is right, your Honor.

The Court: Very well.

Q. (By Mr. Robnett): Mr. Eustice, I am showing you Exhibit 3, which is the photostatic copy of Sam Ormont's income tax for 1944, and I will call your attention to the third page and to the 12th item, which is interest on business indebtedness, \$817.42. I ask you, Mr. Eustice, did you disallow that item in your calculations of Mr. Ormont's 1944 income? A. Yes, sir.

Mr. Strong: That is objected to because this is an item purporting to be the income of some other person.

Mr. Robnett: No, not that one, Mr. Strong.

(Testimony of J. Bryant Eustice.)

The Court: He has asked him about Exhibit 3.

Mr. Strong: I am sorry. I thought it was Exhibit FF.

Q. (By Mr. Robnett): You did disallow that entirely, didn't you, as a [715] deduction?

A. Yes, sir.

Q. It was charged in the report as a deduction or expenses consisting of interest paid on indebtedness, isn't that correct?

A. Yes, interest on Sam Ormont's capital investment.

Q. That is the way you calculated it?

A. That is the way it shows on the books and records.

The Court: Is that the way you calculated it?

The Witness: I disallowed it on that account; yes, sir.

Q. (By Mr. Robnett): If that item of \$817.42 was paid to someone other than Mr. Ormont as interest on money loaned or on a loan, then that item should not be disallowed by you, should it?

A. No, it would not be disallowed.

Q. I now show you Exhibit FF, which is the individual income tax return for the year 1944 by Dora Goldberg, and ask you if you in your examination and determination of the income of Mr. Ormont for 1944 and the tax you claim he owed, you saw the original of that Exhibit FF.

A. No, sir, I did not.

Q. You did not investigate any returns by Dora Goldberg at all?

(Testimony of J. Bryant Eustice.)

A. No, sir, I did not. [716]

The Witness: That is the copy, is it not?

Mr. Robnett: That is the copy.

The Witness: It doesn't show the date it was filed, does it?

Q. No. It was filed some time before the 15th of March, 1945.

A. Does it say so here?

Q. No, it does not say so. That is just an office copy. I will ask you to look at this Exhibit F, and state if it is not a fact that that shows a report by Dora Goldberg of dividends or interest, in the sum of \$817.42?

A. That is correct.

Q. That amount is identical with the amount that you disallowed on Sam Ormont's return?

A. Yes, that's right.

Q. It shows a tax of \$53, doesn't it?

A. \$53.

Q. Thank you. I believe counsel is agreeable to stipulating that the \$53 tax on this Exhibit FF was paid by the taxpayer reported there.

Mr. Strong: Yes, subject to check.

Mr. Robnett: Thank you very much, Mr. Eustice, and that is all.

The Court: You had some further direct examination of this witness, I believe? [717]

Mr. Strong: Should I go into that first? I have some further direct, yes.

The Court: Your direct examination of this witness was interrupted, I think.

Mr. Strong: Yes. That was about something else.

(Testimony of J. Bryant Eustice.)

The Court: You were examining the witness on the Phillip Himmelfarb matter, or had begun?

Mr. Strong: That is right.

The Court: Are you going to continue on that, or are you going to direct your questions now to the redirect examination of this witness?

Mr. Strong: I will leave that to your Honor's discretion.

The Court: It is immaterial to me. I just want to know, so I will be able to rule in the event objections might be made.

Mr. Strong: I will start with a continuance of the direct examination as to Phillip Himmelfarb, and that may simplify matters.

The Court: Very well.

Mr. Robnett: As I understand, I have a standing or running objection to that evidence on the ground that it is incompetent, irrelevant and immaterial, hearsay as to the defendant Sam Ormont, and not binding upon him.

The Court: Is there any objection to that? You have not asked any questions yet. I think maybe you had better ask a [718] question, and then state your objection.

Mr. Strong: I will assume that the same sort of objection arrangement we had before would apply.

The Court: Very well. The defendant Ormont will not have waived any of his rights by his failure to object.

Mr. Strong: That is right.

(Testimony of J. Bryant Eustice.)

Direct Examination

(Continued)

By Mr. Strong:

Q. Mr. Eustice, directing your attention to income tax return of the defendant Phillip Himmelfarb for the year 1944, which is Government's Exhibit 4, and also I will give you Government's Exhibit 5, which is the income tax return for the year 1944 for Mrs. Phillip Himmelfarb, Ruth Himmelfarb, I direct your attention to Phillip Himmelfarb's return, and I now ask you whether you made any investigation as to the income tax return filed by Phillip Himmelfarb for that year?

A. Yes, sir, I did.

Q. And in connection with that investigation, will you state what books or records you used?

Mr. Katz: That is objected to as incompetent, irrelevant and immaterial; no foundation laid, if the Court please, and not bearing on any issue in this case. It has been asked and answered.

The Court: I have forgotten whether or not it has been asked and answered. I don't think it is incompetent, or [719] irrelevant or immaterial. If it has been asked and answered it will not hurt for him to answer it again, so he can get back on the track. Objection overruled.

A. I examined the books and records of the Acme Meat Company.

Q. (By Mr. Strong): Is that all?

A. I examined other records, but in my determination of the defendants' correct tax——

(Testimony of J. Bryant Eustice.)

The Court: What other records? You said you examined other records. Now counsel wants to know what records you examined.

The Witness: The bank record, and things I had in my work papers the other day, which I believe were taken out of evidence as I did not use them in the determination of the defendants' correct tax.

Q. (By Mr. Strong): Did you examine any bank records?

A. I made a list of some of these bank records but they were not——

Q. Just answer what you examined without going into an explanation, please.

Mr. Katz: Counsel prefers explanations, if the Court please.

Mr. Strong: At the appropriate time, your Honor please. This isn't it.

The Court: An appropriate explanation?

Mr. Strong: Yes. This isn't appropriate.

Q. All I want to know is what books and records you examined.

A. The books and records of the Acme Meat Company, and I also examined this joint venture income tax return.

Q. That is Government's Exhibit 6?

A. Yes, sir.

Q. And you examined the income tax return of Phillip Himmelfarb, which is before you?

A. That is correct.

Q. How about the return of Ruth Himmelfarb?

A. I also examined that return.

(Testimony of J. Bryant Eustice.)

Q. Now in connection with the books and records of the Acme Meat Company, where did you examine those books and [721] records?

A. In the office of the Acme Meat Company.

Q. Do you have those books and records now?

A. I do not have them; no, sir.

Q. Where did you leave them?

A. In the office of the Acme Meat Company.

Q. Did you discuss with the defendant Phillip Himmelfarb any portion of those books and records that you were examining?

Mr. Katz: Objected to, if the Court please, as incompetent, irrelevant and immaterial. It has no bearing on any issue in this case. No conversation is admissible and no corpus delicti has been established.

Mr. Strong: This is preliminary as to the records, your Honor.

The Court: You may answer that question yes or no. The objection is overruled to that question.

The Witness: May I have the question again?

(The question referred to was read by the reporter as follows:

“Q. Did you discuss with the defendant Phillip Himmelfarb any portion of those books and records that you were examining?”)

The Witness: Yes, sir; I did. [722]

Q. (By Mr. Strong): Which page or pages did you discuss with him?

(Testimony of J. Bryant Eustice.)

Mr. Katz: Objected to, if the Court please, as incompetent, irrelevant and immaterial, **no bearing** on any issue; conversations are not admissible on the ground that there is neither foundation nor corpus delicti.

The Court: When you asked him which pages he discussed, why then you are getting into the substance of the conversation.

Mr. Strong: Not yet. May I state to your Honor something further? May I say something further?

The Court: I think maybe if you have any argument to suggest that it best be made out of the presence of the jury.

Mr. Strong: But I am not arguing. I just want to state that it is for the purpose of identifying the document. I am not going into its contents.

The Court: I know that, but if it is for the purpose of identifying the document then you are getting into what he said to Himmelfarb and what Himmelfarb said to him.

Mr. Strong: No.

The Court: You cannot help it, otherwise you cannot identify it. The objection is sustained, no foundation laid for the conversation.

Q. (By Mr. Strong): Did you make a record of that portion of the books [723] and records which you examined which you testified to which relates to the defendant Phillip Himmelfarb?

Mr. Katz: Objected to, if the Court please, as not the best evidence. The witness has already

(Testimony of J. Bryant Eustice.)

testified that his records were not used. His records are records that he is not permitted to use. There is no foundation laid. It is incompetent, irrelevant and immaterial.

Mr. Strong: He didn't testify to that, your Honor.

The Court: Do you have that transcript reference there where there was something concerning that in connection with his work papers?

Mr. Strong: But I am not asking him about his work papers.

The Court: I know, but when you are asking about his work papers there was something said at the time about using the records of the Acme Meat Company and copying them into his work papers, and the witness said something with relation to the fact that he didn't use his work papers.

Mr. Strong: Which is a Government exhibit marked for identification.

The Court: Yes.

Mr. Strong: I am not talking about those.

The Court: I know what you are talking about.

Mr. Katz, will you supply the reference?

Mr. Katz: Yes, I believe I have it here. It is in [724] Volume IV and commencing at about 353, 354 and particularly 355 and 356.

Mr. Strong: Since it is 20 minutes to 12:00, and there is a possibility of argument, may it not safe time if we take the matter up now outside of the hearing of the jury so we may proceed more rapidly later?

(Testimony of J. Bryant Eustice.)

The Court: You mean you can proceed with other matter?

Mr. Strong: No, I can proceed with argument on this matter.

Mr. Katz: Pages 363 and 364, there is some testimony, some answers in response to questions that were put to the witness by your Honor.

The Court: Yes.

Now read the question.

(The question referred to was read by the reporter as follows:

("Q. Did you make a record of that portion of the books and records which you examined which you testified to which relates to the defendant Phillip Himmelfarb?")

The Court: The objection is overruled. You can answer that yes or no.

The Witness: Yes, sir.

The Court: What books and records do you mean now?

Mr. Strong: Of the Acme Meat Company. [725]

The Witness: Yes, sir.

Mr. Strong: May I see them?

The Court: Are those in your work papers, Exhibit 41?

The Witness: I believe it is in 40, your Honor.

The Court: Because you testified that you did not use your working papers.

Mr. Strong: No. 41.

The Court: "Any of these work papers in the determination—I did not use any of these work

(Testimony of J. Bryant Eustice.)

papers in the determination of the defendant's income."

Mr. Strong: We were talking about 41, your Honor. That was what the voir dire was on.

The Witness: The account, your Honor, that he refers to I have in Exhibit 40, the work papers of Sam Ormont.

Q. (By Mr. Strong): You have those work papers before you? A. Yes, sir.

Q. Now as to the figures——

The Court: Exhibit 40 is in evidence.

Mr. Strong: I think it is for identification.

The Court: Yes, it is for identification.

Q. (By Mr. Strong): As to those figures which were contained upon the records of the Acme Meat Company with reference to Phillip Himmelfarb which you examined and concerning which you have [726] just testified, and you have there a transcript or summary, did you discuss any of those figures with the defendant Phillip Himmelfarb? A. Yes, sir.

Mr. Katz: If the Court please, I renew the objection that there is no foundation laid, it is in-6—Himmelfarb—folio Horton—12/15 Sprague competent, irrelevant and immaterial, that it is not the best evidence and, if the Court please, discussions are inadmissible until the corpus delicti has been established.

The Court: He isn't asking what the discussion is yet in this question. He said, did you discuss it with him. He can answer that yes or no. He he

(Testimony of J. Bryant Eustice.)

says "no" then we do not have to worry about any more questions.

The Witness: Yes. [727]

Q. And did you discuss with Mr. Himmelfarb the accuracy of those figures? A. Yes, sir.

Mr. Katz: Objected to, if the Court please. It is the same objection. He is asking the question whether he discussed the accuracy, which calls for the matter that was discussed.

The Court: That is right. Objection sustained.

Mr. Strong: May I be heard on that before your Honor sustains it?

The Court: Sustained.

Mr. Strong: Without hearing me?

The Court: You have not laid any foundation.

Mr. Strong: This is it. That is why I suggested we might have an argument before.

The Court: You can't lay the foundation by giving any substance of the foundation. You asked him if he discussed these figures with him and he said yes. You have got to lay the foundation before anything they said to one another, whether as to the accuracy, or anything else, can be introduced. Then I have to decide whether or not the foundation is good enough.

Q. (By Mr. Strong): When did this discussion take place?

A. The latter part of November, 1945.

Q. Where did it take place? [728]

A. In the office of the Acme Meat Company.

Q. I can't hear you.

(Testimony of J. Bryant Eustice.)

A. In the office of the Acme Meat Company.

Q. Who was present?

A. Mr. Himmelfarb, Mr. Phoebus and myself.

Q. Did you have the books and records that you were examining there at that time?

A. Yes, they were before us.

Q. Did you discuss with Mr. Himmelfarb the accuracy of the figures relating to Himmelfarb, as shown by those books and records of the Acme Meat Company?

Mr. Katz: Objected to, if the Court please. I renew my objection. If necessary, I will repeat it in full. It is the same objection that has just been made.

Mr. Strong: This is preliminary, your Honor.

The Court: I am thinking about the sufficiency of your foundation. When was that conversation?

The Witness: The latter part of November, 1945.

The Court: What is said in the testimony in the record, if there is any in the record, about the incorporation of the Acme Meat Company?

Mr. Strong: That was in 1947.

Mr. Robnett: 1946, your Honor.

The Court: It was after November, 1945. What is the testimony in the record about who owned the Acme Meat Company [729] in 1945, September of 1945?

Mr. Robnett: Mr. Sam Ormont.

The Court: He was the sole owner of the Acme Meat Company?

Mr. Robnett: Yes.

(Testimony of J. Bryant Eustice.)

The Court: The objection will be overruled, as to the defendant Himmelfarb. The objection will be sustained as to the defendant Ormont. None of this line of testimony will be received or considered by you in connection with the defendant Ormont unless I otherwise indicate by a ruling.

Mr. Strong: May we have the question read to the witness?

(Question read by the reporter.)

The Court: On second thought, I don't think there is sufficient foundation laid for that conversation.

Mr. Strong: I will ask some more questions, if I may.

The Court: All right. I will sustain the objection upon the ground that there is no sufficient foundation.

Q. (By Mr. Strong): Did you show Mr. Himmelfarb any of the records of the Acme Meat Company on that occasion? A. Yes, sir.

Q. Did you show him any particular part of the records? A. Yes, sir.

Q. Will you state whether the page had any heading or identification in any way, that you showed him? [730] A. Yes.

Mr. Katz: I object to that, if the Court please. The page would be the best evidence of what it contained.

The Court: There is no sufficient foundation laid.

Mr. Strong: He is still talking with him.

(Testimony of J. Bryant Eustice.)

The Court: There isn't a sufficient foundation to permit the conversation.

Mr. Strong: Can I argue it in the presence of the jury?

The Court: No.

Mr. Strong: I can't argue?

The Court: Did you tell Mr. Himmelfarb that you were an Internal Revenue Agent?

The Witness: Yes, sir, I did.

The Court: Did you show him any credentials?

The Witness: Yes, sir.

The Court: Did Mr. Phoebus?

The Witness: He had been on the case before me. I couldn't say, your Honor.

The Court: You don't know?

The Witness: I don't know.

The Court: There still isn't sufficient foundation.

Mr. Strong: I will withdraw him, and put on Phoebus.

The Court: All right. Step down for the moment.

(Witness temporarily excused.) [731]

SAMUEL J. PHOEBUS

a witness called on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, sir?

(Testimony of Samuel J. Phoebus.)

The Witness: My name is Samuel J. Phoebus.

The Clerk: P-h-o-e-b-u-s?

The Witness: Yes.

Direct Examination

By Mr. Strong:

Q. What is your occupation?

A. I am Special Agent with the Bureau of Internal Revenue.

Q. How long have you had that job?

A. Roughly, two years.

Q. When did you start?

A. July 1st, 1945.

Q. Subsequent to July 1st, 1945, did you have occasion to investigate, in your official capacity, the income tax return of the defendant, Phillip Himmelfarb, for the year 1944? A. I did.

The Court: With relation to a possible criminal violation?

The Witness: No, sir.

Q. (By Mr. Strong): What was the nature of your investigation? [732]

A. We were determining whether or not he had paid his proper tax.

Q. And did you have occasion to speak to the defendant Phillip Himmelfarb at any time in connection with that investigation? A. I did.

Q. When was the first time?

A. I first met Mr. Himmelfarb——

Q. Just the date.

(Testimony of Samuel J. Phoebus.)

The Court: No. Just on what date?

The Witness: May 18, 1945.

Q. (By Mr. Strong): Where was that?

A. At the plant of the Acme Meat Company.

Q. Did you tell Mr. Himmelfarb who you were?

A. At that time I didn't, no.

Q. Did you ever tell him? A. I did.

Q. When was the first time?

A. I would say it was May 23rd.

Q. What year? A. 1945.

Q. What did you tell him at that time?

Mr. Katz: I object to that as incompetent, irrelevant and immaterial, and having no bearing upon the issues in this case; [733] no proper foundation laid.

The Court: He asked him what he told the defendant Himmelfarb; not what the defendant Himmelfarb told him.

Mr. Strong: Yes.

The Court: Objection overruled.

The Witness: I told him we contemplated making an examination of his income tax returns.

Q. (By Mr. Strong): Did you tell him who you were?

A. I told him who I was, and showed him my identification, I believe. My memory is not too clear on that, whether or not I showed him my identification. I had already identified myself to other people there in the plant.

The Court: But not to Himmelfarb previously?

(Testimony of Samuel J. Phoebus.)

The Witness: My recollection on that is not clear, no, sir.

Q. (By Mr. Strong): Are you speaking now of showing your identification?

A. Showing my identification.

Q. Did you tell him at any time who you were?

A. I can't say that I did tell him.

The Court: At any time?

The Witness: At any time.

Q. (By Mr. Strong): Did you discuss with him his income tax returns for [734] the year 1944?

Mr. Katz: I object to that, if the Court please, as immaterial.

The Court: Objection sustained.

Mr. Strong: May I be heard on that?

The Court: You have not laid any foundation.

Mr. Strong: This is part of it.

The Court: I can't help it. You have not laid any foundation. Objection sustained. [735]

The Court: You were present with Mr. Eustice on the date he mentioned—when was that, Mr. Eustice?

Mr. Eustice: The latter part of November, your Honor.

The Court: In November, 1945, on that date?

The Witness: I was, your Honor, yes.

The Court: When you and Mr. Eustice discussed the matter with Mr. Himmelfarb?

The Witness: I was there at that time.

The Court: Did either you or Mr. Eustice at any

(Testimony of Samuel J. Phoebus.)

time state to the defendant Himmelfarb that any statements he might make or disclosures concerning his business might be used against him in a criminal prosecution?

The Witness: On that occasion no statements like that were made; no, sir.

The Court: You did not?

The Witness: No.

Mr. Strong: May I be heard on that?

The Court: No. Proceed.

Mr. Strong: That is all of this witness.

The Court: Step down.

(Witness excused.)

Mr. Strong: Mr. Eustice.

J. BRYANT EUSTICE

resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Strong:

Q. Did you ever discuss with the defendant Philip Himmelfarb what status he occupied with reference to the Acme Meat Company?

Mr. Katz: If the Court please, that is objected to as incompetent, irrelevant and immaterial, no foundation laid, no corpus delicti established.

The Court: The objection is overruled. It calls for a yes or no answer.

The Witness: Yes, sir.

Q. (By Mr. Strong): When was that?

(Testimony of J. Bryant Eustice.)

A. It was during, I would say, about the middle of November, the preliminary part of the examination that I was making.

Q. Who was present?

A. Mr. Phoebus, Mr. Himmelfarb.

Q. Was that the occasion you testified to before?

The Court: The latter part of November?

The Witness: I had had other discussions as to his relationship, I believe, prior to that date. If I recall correctly, it also came up in the discussion at this particular time, too.

Mr. Strong: I think, your Honor, I can save time by putting on some other witnesses who will be here at 2:00 [737] o'clock as to this phase, and this is only on the competency of the secondary evidence, that is all.

The Court: I understand. Do you wish to proceed with redirect examination of this witness on Mr. Robnett's cross-examination?

Mr. Strong: We only have seven minutes and I would rather keep it all together, if your Honor has no objection. I think it is more intelligible.

The Court: At 2:00 o'clock we have another matter coming up, so that the jury may be excused until about 2:30 before we will be ready to proceed. Remember the admonition.

(Whereupon, at 11:55 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [738]

No. 11662-11666

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

IN FOUR VOLUMES

VOLUME III

Pages 889 to 1266

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

No. 11662-11666

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Transcript of Record
IN FOUR VOLUMES
VOLUME III
Pages 889 to 1266

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

(Testimony of J. Bryant Eustice.)

Los Angeles, California, Wednesday, June 4, 1947
2:00 P.M.

(The following proceedings were had outside
the presence of the jury:)

The Court: United States vs. Ormont and Him-
melfarb. The motions and affidavits have been
served upon the District Attorney.

Mr. Robnett: Yes, your Honor.

The Court: Are you ready at this time?

Mr. Strong: Yes, your Honor.

The Court: Very well.

Mr. Robnett: Your Honor, this is a motion to
quash subpoena, and to quash the service of the
same, a duces tecum subpoena, which is set forth
verbatim in the motion, and was issued the 2nd day
of June, 1947, addressed to Sam Ormont, one of the
defendants in this case; also to the Acme Meat Com-
pany, Acme Meat Company, Inc., and was served
on Mr. Ormont, according to the affidavit that is
filed in support thereof, yesterday, the 3rd day of
June, 1947, in the court room, during the progress
of the trial.

The affidavit further shows that Mr. Ormont is
a party defendant in this action, and in each count
thereof; that the papers, books and records that are
in his possession, and the only ones in his possession,
are his own personal papers, books and records, as
Sam Ormont, or Sam Ormont, an individual doing
[742] business under the fictitious name and style
of Acme Meat Company.

(Testimony of J. Bryant Eustice.)

That there are no books or papers in his possession of the corporation Acme Meat Co., Inc., and the affidavit shows that the corporation was not organized until May 29, 1946. The subpoena calls for books, papers and records during the years 1944 and 1945, which, of course there was no corporation then, and that Mr. Ormont is the sole individual that was doing business as Acme Meat Company during that time. That this would be requiring him to furnish evidence against himself, in violation of the Constitution of the United States, and of the rules of court.

The Court: I would like to hear from the District Attorney.

Mr. Strong: The first thing I want to say, your Honor, is that the service made in the court room was wholly without my knowledge, and without my suggestion. In fact, had I known such a thing was intended, I certainly would not have permitted it. As a matter of fact, I don't permit services in the halls of this building on anybody. I always require that be done outside, in the streets. It was not at my suggestion.

The Court: I don't think the defendant suffered any prejudice by virtue of that. I knew that the man was a Deputy Marshal.

Mr. Strong: It was a lady. [743]

The Court: Yes. I remember, and a good looking lady, too. That can go into the record. And that it had to do with some process, but I doubt that

(Testimony of J. Bryant Eustice.)

the jurors did, and there has been no showing that they did.

Mr. Strong: As to the other point, I, of course, am fully familiar with the guarantees contained in the United States Constitution against self incrimination. I am also familiar that where documents are in the possession of a third party, who is not a defendant—that those documents can be subpoenaed. That was why we included the Acme Meat Co., Inc., which we understood was the successor in point of time to the Acme Meat Company. If they don't have the books, of course, they cannot produce them.

The Court: The Acme Meat Co., Inc., if it is a corporation, and it has any records relating to that matter, you would be entitled to have them. The defendant's affidavit states that there is nothing in the records of the Acme Meat Co., Inc., relating to any loans to Phillip Himmelfarb during the years in question.

Mr. Strong: We are not talking about the records of the Acme Meat Co., Inc., but rather the Acme Meat Company, an entity, having physical possession of the records of either Mr. Ormont or the Acme Meat Company, a partnership.

The Court: It was not a partnership, according to the records before me. It was an individual doing business under [744] the fictitious name of Acme Meat Company, which still makes it an individual, and his records.

Mr. Strong: That is what we were attempting from the corporation.

(Testimony of J. Bryant Eustice.)

The Court: I don't believe you would be entitled to a subpoena againts Sam Ormont, or Sam Ormont doing business as Acme Meat Company.

Mr. Strong: I pointed out why I had issued that subpoena, because of my misunderstanding of what your Honor had meant.

The Court: As to the Acme Meat Co., Inc., there is no showing here, if you desire their books and records for inspection, to determine whether or not the books and records of Acme Meat Co., Inc., do reflect anything concerning loans. I don't see how it could, because it was not incorporated.

Mr. Strong: I don't desire the records of the Acme Meat Co., Inc.

The Court: The subpoena will be quashed. [745]

Mr. Strong: Now may I be heard—I know while the jury was here your Honor didn't let me do any arguing—I would like to be heard for a few minutes on some of these other matters.

The Court: Very well.

Mr. Strong: All of the questions which were directed to the witness Eustice with reference to his conversations with the defendant Himmelfarb as to the contents of the pages of the Acme Meat Company records which deal with Himmelfarb preliminarily, I believe that under the law where a defendant is shown to have examined or looked at or discussed the contents of a page, even though it is not his page, it is somebody else's page, that if he is shown to have knowledge of those figures that are on that page and then the page is shown to be

(Testimony of J. Bryant Eustice.)

unavailable, that it can be shown prior to the offering of secondary evidence, that it can be shown that he knows what is on that page and he discussed it, and that the contents of that page, or agreed to, or approved by him, or accepted by him as being true.

The Court: It all resolves itself around the proposition if a conversation is admissible as against interest by the defendant Himmelfarb. If at the time he had the conversation with the defendant Himmelfarb, if the witness Eustice had certain facts and figures, you would not be able with the witness Eustice's facts and figures that he had copied there, [746] but you would be able, if the conversation is otherwise admissible, to get into the evidence all that he showed the defendant Himmelfarb.

Mr. Strong: This is one page which they discussed.

The Court: I can see that, but it is only by virtue of an admission against interest. Therefore it requires knowledge on the part of Himmelfarb before it can be an admission. Consequently Eustice must have communicated to Himmelfarb or must have shown him the document so that he would know what he was admitting or discussing. But I have sustained the objection so far because you haven't laid the foundation for that.

Mr. Strong: That depends on what your Honor regards as the foundation.

The Court: The foundation is for a conversation or for an admission against interest.

Mr. Strong: The objection that was sustained

(Testimony of J. Bryant Eustice.)

dealt with the failure of presenting evidence as to the corpus delicti. The objection was on the ground that since there was no evidence of a corpus delicti in this case you couldn't introduce admissions.

The Court: I sustained the objection up to this point on the ground that there was no foundation for the admission against interest, among others, that there was no corpus delicti proved, and among others the fact that he was having a [747] conversation with two Government officers, and in the present state of the record I doubt if the conversation is admissible because they were investigating him from a criminal point of view and did not warn him of his rights.

Mr. Strong: If I may suggest, the record is to the contrary; they were not investigating him from a criminal point of view. That is what the witness testified to in answer to a question I think by your Honor.

The Court: That might have been what the witness Phoebus thought but the fact is he is now charged with a crime based on that investigation. So it was an investigation looking towards a criminal prosecution, and it was their duty to warn him, not only that they were Government officers, which Mr. Eustice did but which Mr. Phoebus, very candidly admitted, he didn't know whether he had done it the first time or not but that subsequently he told him. But to also warn him that he need not make any statement or that anything he might say might be used against him.

(Testimony of J. Bryant Eustice.)

Mr. Strong: May I just address myself first as to whether or not the fact that a criminal prosecution follows is necessarily a factor which might vitiate an examination made at a time when no criminal prosecution was contemplated.

At the time they were investigating him, as I understand the record, they were looking to find out what the status of the taxpayer's income was and whether he had paid his whole [748] tax. They do not make a determination as to whether a criminal case will or will not be had.

The Court: I know they do not make that determination, but they do the investigation in advance. In fact, I can take judicial notice of the fact that in the Internal Revenue Department there are the different categories of duties: There is the deputy collector, whose duties are limited. They do not have the power nor the duty to make a criminal investigation.

Then there are the agents, such as Mr. Eustice, who do the auditing. He does not institute criminal investigation or recommend them.

But when it goes to the special agents, that is their job. In other words, I think I can take judicial notice of this, that a criminal prosecution is not instituted in connection with an income tax violation until it has gone through the special agent's division.

Mr. Strong: That is probably so, but that doesn't

(Testimony of J. Bryant Eustice.)

necessarily follow that each examination is followed by a criminal prosecution.

The Court: This one is.

Mr. Strong: As to that point I submit to your Honor, without any argument, that the defendant knew what the investigation was about because the witness Eustice told him what he was there for, he was investigating his income tax returns [749] and he was investigating the income, and that I think that if it is at all necessary for any of the agents to make a disclosure as to what they are doing or who they are, the fact that Mr. Eustice did so is sufficient to cover any other agent present since they were all there together from the Internal Revenue Bureau all on the same investigation.

But to go one step further, I would like to point out to your Honor—I suppose your Honor has had it pointed out to you before, but I would like to point out these decisions which indicate, even where there is no warning, it doesn't make the slightest bit of difference.

Here is the case of *Morton v United States*, 147 F (2d) 28, which is the United States Circuit Court of Appeals for the District of Columbia, certiorari denied in 65 Supreme Court 105. Reading from page 31 of Volume 147 F (2d) it says:

“The trial court admitted testimony of a police officer concerning admissions made to him by appellant after his arrest. Its admissibility is challenged on the ground that when the appellant was questioned he was nervous

(Testimony of J. Bryant Eustice.)

and jittery and was very much under the influence of liquor, the police did not at any time warn him whatever he said would be used against him or even tell him that he was charged with any crime and therefore he had no reason to think that he needed counsel. These facts [750] assuming their correctness, did not render the admission inadmissible. Even a confession given under such circumstances would have been admissible. The rules governing the reception in evidence of admissions are much less onerous than those concerning confessions.”

Then they go on discussing the difference between a confession and an admission.

Well, in this case all that we are getting at at this point—and I want to emphasize that again—we aren’t discussing what those figures show in so far as they may reveal any criminality or in so far as they may reveal additional income—that I intend to show by secondary evidence—all I want to show at this point is that this secondary evidence is good as against this defendant because he had knowledge of the contents of the page from which this transcript was made, because he discussed that page and indicated that he knew what those facts are on it. And just on the basis of that testimony I submit that that secondary evidence is admissible.

The Court: Let me see your page. Where is your page?

(Testimony of J. Bryant Eustice.)

Mr. Strong: The original record?

The Court: No, you say you have a page.

Mr. Strong: I am talking about the one page in the original record from which a transcript was made.

The Court: You say you are going to have secondary evidence. [751]

Mr. Strong: Yes. That is the testimony of the witness Eustice.

The Court: That wouldn't be secondary evidence, that would be primary evidence of an admission against interest.

Mr. Strong: But it isn't an admission until he says something.

The Court: I know it is not, but if you show it to him and he knows it and then he says something, why then it is an admission against interest.

Mr. Strong: But he wasn't talking about this particular sheet of paper, he was talking about the original record which they were examining and which is now not available. That is the one which I want to show that the defendant Himmelfarb saw.

The Court: What did he show him?

Mr. Strong: He showed him the original record.

The Court: You mean Mr. Eustice showed him the original record?

Mr. Strong: They were at the Acme Meat Company, Mr. Eustice is looking at the original record and he shows it to Mr. Himmelfarb and they discuss it.

(Testimony of J. Bryant Eustice.)

The Court: Now your secondary evidence, as you call it, is Mr. Eustice's record of what was on that sheet?

Mr. Strong: Yes. [752]

The Court: Let me see it.

(The document referred to was passed to the Court.)

The Court: What is your point? What you are trying to prove is that Mr. Eustice and Mr. Phoebus talked to Mr. Himmelfarb on or about the date that has been or will be established in testimony, and that at that time Phillip Himmelfarb admitted that he had received \$4500 in withdrawals against share of profit for April and July——

Mr. Strong: No, your Honor, that is not what I am trying to show.

The Court: What are you trying to show?

Mr. Strong: I am trying to show he had a conversation with him on that date at the Acme Meat Company, that at that time they had available and before them the original records of the Acme Meat Company with the account of Phillip Himmelfarb. They turned to that page. All I want to show at this point is that they discussed with him those figures without going into what they said at all and that he said that they were correct and accurate. That is all. Then I want to show what those figures are by introducing this second best proof because we do not have the original record.

(Testimony of J. Bryant Eustice.)

I am not going to have him testify to Mr. Himmelfarb admitting anything.

The Court: I thought you just said that he admitted that they were true and accurate.

Mr. Strong: Yes, but not as to what the figures show. [753] In other words, he had knowledge of the contents of that page. That is what I am trying to show. Having had knowledge of the contents of the page, then that record——

The Court: In other words, in substance you are offering to prove that the witness Eustice will testify that on or about that date he talked to the defendant Himmelfarb, that he showed the defendant Himmelfarb the page of the accounts of the Acme Meat Company, that on that page were these items?

Mr. Strong: That I will show later; that on that page were some items.

The Court: These items?

Mr. Strong: I am not going to ask him at this point because that is the secondary evidence going in. [754]

Mr. Strong: The point is, I want to show the items they discussed, and he accepted those items.

The Court: What items?

Mr. Strong: Those items will then be shown in the testimony of these witnesses.

The Court: To be those items?

Mr. Strong: That is the second proposition, in lieu of the original record. As I understand it——

The Court: Wait just a minute. Let me get

(Testimony of J. Bryant Eustice.)

this straight. I think we are talking a little at cross purposes. As I said they can only be admitted as admissions against interest; therefore, they must be conversations; therefore, they must be something he knew before he could admit it. I understand your proposed offer of proof is that Eustice showed him the page upon which these items were?

Mr. Strong: Yes.

The Court: Then Himmelfarb said he knew they were there, and they were correct, and that is, in substance, what you want to prove?

Mr. Strong: Yes. I want to prove these aspects of the objection, which your Honor sustained; that is, in reference to the books and records which the defendant Himmelfarb himself did not write. Of course, if he had not written them, there would be no proffer.

The Court: I understand that is true as to this whole item? [755]

Mr. Strong: Yes.

The Court: You haven't yourself claimed——

Mr. Strong: I also call your Honor's attention to the case of the United States vs. Hydner.

The Court: Wait until I look at the Merton case a minute.

Mr. Strong: All right.

The Court: In the Morton case, in reading that case, it does not appear that there was any conversation introduced, except the one question, that the police accused him of murdering Mrs. Groom, to which he answered no. That, the court substantially

(Testimony of J. Bryant Eustice.)

held he could not be harmed by that statement; that that was actually not an admission against interest. They recite here, that otherwise he gave the conversation: Yes, and what do you want? He said yes, when they opened the door, and asked them what they wanted, and they said they were from police headquarters, and wanted to talk to him. He met the inspectors, and said: What do you want? They said: You will find out when you get down there. Then they searched the room, and found bloody clothes, and other evidence, and the court held that that independently was sufficient to cause them to have a duty to arrest him. I don't think this would be authority. They did not raise in that case the question of failure to prove the corpus delicti. [756]

Mr. Strong: I am now talking primarily on the question of whether or not these agents had to disclose they were investigating about anything they said could be used against them. I think point 12 is directly on the point, where it said the trial court admitted testimony against interest.

The Court: They went on and said: Did you murder Mrs. Groom? He said no. That would not be an admission.

Mr. Strong: No. But they discussed the law in the way of admissions which may be admitted. I think in that case they pointed out, even if a police officer doesn't warn you, that it is not an admission. In the case in 149 Fed. 2nd, 105, there again the objection was that the policeman asked the de-

(Testimony of J. Bryant Eustice.)

fendant what he had in the building, but did not tell him that the answer might be used against him.

The Court: What was the answer?

Mr. Strong: Whatever the answer was.

The Court: I know, but by the time these go up to the Circuit Court of Appeals, they write a very instructive discussion of the law, and finally wind up, as they did in the Martin case, that it would not make any difference anyhow. If we apply it wrong, they say it is not the law. Then they say it is dicta. Here, he was arrested, and in the custody of the officers. This fellow knew he was wanted for something.

Mr. Strong: This defendant knew they were investigating his income tax returns. [757]

The Court: But they did not know they were investigating them for a criminal prosecution.

Mr. Strong: In the other case he did not know what he was wanted for. Your Honor said he knew he was wanted for something.

The Court: He was arrested. They arrested him for violation of the Liquor Act. They found him in possession of a liquor still, making liquor out of prune juice.

Mr. Strong: It's not good liquor.

The Court: I have forgotten.

Mr. Strong: I know.

The Court: In this case they had just taken him to jail, and he started talking.

Mr. Strong: I don't know how far I have succeeded in convincing your Honor, but that was all

(Testimony of J. Bryant Eustice.)

offered in reference to the use of the defendant Himmelfarb's statements to the effect that these pages were accurate, for the purpose of showing by secondary evidence what those pages contained. There are other reasons why this secondary evidence should be admitted. First of all, there are several cases which hold that where there are several defendants——

The Court: If you are able to establish a proper foundation, then I will admit the testimony of the witness Eustice, to the general effect as you have recited it to be, to-wit: That he had a conversation; that he showed him the book and [758] page; that on that page were these items; that he called Himmelfarb's attention to it, and Himmelfarb said they were correct.

Mr. Strong: I was under the impression that we had established the proper foundation.

The Court: That is all we are arguing about now, as to whether you had. I think the officers were under duty to warn him that the statement might be used against him.

Mr. Strong: The evidence already is that Mr. Phoebus did not warn him, but Mr. Eustice indicated who he was.

The Court: There are millions of investigations. They send out a mimeographed letter, which said: Explain the item for \$2.48, taxicab fare from Chicago Union Depot. It seems like the Attorney General—from the Chicago Union Depot to some place else.

(Testimony of J. Bryant Eustice.)

Mr. Strong: I will pass, your Honor, to another point I want to make. The evidence of what they said is already in. If your Honor says that is not sufficient to establish a basis, that is all I have on that point, because he testified to what was said.

The Court: He hasn't testified to what was said.

Mr. Strong: Your Honor said the proper foundation had to include a showing on their part.

The Court: I don't think you have shown any corpus delicti. I realize that in tax cases, and in most cases [759] involving any complications at all, that the order of proof sometimes is very difficult, but I don't think you can prove this offense by an admission of the defendant.

Mr. Strong: I am not seeking to, your Honor, but I can not get the books, your Honor.

The Court: Then you will have to establish the corpus delicti some other way before you attempt to establish it by admission. I don't think the foundation is sufficient to admit this testimony as to conversations with Himmelfarb, as presently identified.

Mr. Strong: On the second reason, as to why secondary evidence of the contents of these books should be admitted.

The Court: Do you mean, other than what you have indicated?

Mr. Strong: Other than the question of the conversation with Himmelfarb.

The Court: You have other evidence?

Mr. Strong: No; I have other reasons why this

(Testimony of J. Bryant Eustice.)

evidence should go in, and I should like to be heard on that.

The Court: All right.

Mr. Strong: First of all, there are cases that hold where there is more than one defendant on trial for the same offense—in this indictment Counts I and II, both defendants are on trial for the same offense—that where books of one of the defendants are held by one of the defendants, and he refuses [760] to give them up because of his constitutional privilege, that secondary evidence of the contents of those books can be introduced as to the second defendant. As to the first one, there is no problem. As to the second defendant——

The Court: That would be hearsay.

Mr. Strong: Those books are unavailable for a reason.

The Court: Assuming you are correct on that, Mr. Strong, it would still be hearsay as to the defendant Himmelfarb, which was the original objection made by Mr. Katz. What the books of the Acme Meat Company said about Himmelfarb is hearsay as to Himmelfarb. He has no control over them.

Mr. Strong: There are cases which hold—one is the case of *Wilkes v. United States*, 80 Fed. 2nd, 285.6211,—that the books of a corporation can be used to show certain factual entries thereon against an individual who is not an officer of the corporation, and did not make the entry. Then there is the case in which the books of the company were

(Testimony of J. Bryant Eustice.)

used to show the value of lots as recorded on those books, not against the company, but against some other party. That is the case of *United States v. Beck*, 118 Fed 2nd, 178.

The Court: No. 7 says books of the corporation are admissible where the corporation is shown to have been dominated and controlled by defendant against whom they are offered. And there is no showing here to that effect. The showing is just to the contrary, and as I understand your avowed position, it [761] is contrary, that Himmelfarb was a partner.

Mr. Strong: I think we will save time by going to my third point, which is that I want to show that Himmelfarb was a partner, and consequently the books and records are evidence against him, even by secondary evidence, and as to that I have three witnesses, your Honor, I would like to put on for the specific purpose of showing that Himmelfarb himself told outsiders, and through documentary evidence, which I have——

The Court: Other than the books of the Acme Meat Company.

Mr. Strong: The proof I have in my hands.

The Court: Let me see it so that we can save time.

Mr. Strong: I want to show that the defendant Himmelfarb obtained these policies in which he had himself and Ormont named as co-partners doing business as Acme Meat Company, and that he so

(Testimony of J. Bryant Eustice.)

advised the agent, that he was a partner of Ormont during the period in question; and these documents, which are documents dealing with the Acme Meat Company, insurance, in which the Acme Meat Company is signed by Phillip Himmelfarb.

The Court: Oral admissions of a party made under such circumstances, it occurs to me, are admissible.

Mr. Strong: The third item of evidence is the return, Government's Exhibit 6, which they denominated for that period a joint venture. The books would be admissible as to either one.

The Court: The books would be admissible?

Mr. Strong: As against either, or evidence of the contents of the books.

The Court: If they voluntarily disclosed it. All right. Call the jury down.

The usual stipulation?

Mr. Strong: The usual stipulation.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

The Court: Do you wish to withdraw the witness Eustice from the stand?

Mr. Strong: May I?

The Court: Yes.

(Witness temporarily excused.)

Mr. Strong: May I have these two sets of documents marked for identification?

The Clerk: 44 and 45.

The Court: 44 is a policy?

The Clerk: Yes, your Honor.

The Court: 45 is a claim or something.

(The documents referred to were marked Government's Exhibits 44 and 45 for identification.)

DAVID L. GORGERTY

a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your address?

The Witness: 2841 Mary Street, La Crescenta.

Direct Examination

By Mr. Strong:

Q. What is your occupation?

A. Insurance broker.

Q. Do you represent the Patriotic Insurance Company of America?

A. I write some insurance with them, or I wrote a policy with them in 1944.

Q. Are you with any insurance agency here?

A. I operate my own agency and insurance broker.

Q. What is the name of it?

A. David L. Gorgerty, insurance broker, at 111 West Seventh Street, Los Angeles.

Q. Now, Mr. Gorgerty, I show you a document that has been marked as Government's Exhibit 44 for identification and ask you if you ever saw that before, and Government's Exhibit 45 for identifica-

(Testimony of David L. Gorgerty.)

tion and ask you if you ever saw that before.

A. (Examining documents) Yes, I have seen both of these instruments before.

Q. As to Government's Exhibit 44 for identification, will you state whether you had that policy issued, that document issued? A. I did.

Q. At whose request?

A. At the request of Mr. Himmelfarb. [764]

Q. Is that the Mr. Himmelfarb who is sitting over here at the defense table?

A. Yes, the same Mr. Himmelfarb who is seated at the counsel table.

Q. When did you have it issued?

A. It was issued on the 3rd of April, 1944.

Q. Did you speak to Mr. Himmelfarb or did he speak to you on that occasion?

A. Well, this policy was issued in lieu of another policy that a company cancelled, and I took this policy to Mr. Himmelfarb when it was issued together with a bill for the difference in the premium between this one and the one that had been cancelled.

Q. Is this policy——

The Court: Just a moment. He hasn't answered your question. The question was, did you speak to Mr. Himmelfarb.

The Witness: And I delivered the policy to him and told him that it was in lieu of the other.

The Court: No. You spoke to him?

The Witness: I spoke to him; that is right.

The Court: All right.

(Testimony of David L. Gorgerty.)

Q. (By Mr. Strong): Was this the first time you spoke to Mr. Himmelfarb concerning the policy? A. No. [765]

Q. When was the first time?

A. About September or October, 1943, I wrote a policy for him.

Q. No, no, I just want the date. That is the first time you spoke to him about the policy?

A. The fire insurance policy on this business, that is right.

Q. Then was it reissued at a subsequent date?

A. This policy was issued in lieu of the other policy.

Q. When? A. In April 1944.

Q. How did you happen to reissue it in lieu of the other one?

A. Because the other company didn't want to carry the risk.

Q. Did you have any discussions with Mr. Himmelfarb as to issuing this policy in lieu of the other one?

A. Well, I simply told him that the company didn't want to carry that risk.

The Court: No, did you have a discussion?

The Witness: Yes, I did.

Q. (By Mr. Strong): Did you issue this policy with the same insured as the one in lieu of which you were issuing it?

A. That is right, I did. [766]

Q. I call your attention to the insured in this

(Testimony of David L. Gorgerty.)

policy. Will you state whether you had it issued as shown?

A. That policy was issued in the name of Phillip Himmelfarb, doing business as Phillip's Meat Company.

Q. When you reissued it?

A. Well, this policy wasn't reissued, it was the beneficiary that was changed on it by endorsement.

Q. When was that?

The Court: Is the endorsement on the policy?

The Witness: On August 1, 1944.

Q. (By Mr. Strong): Is that endorsement on the policy? A. It is.

Q. It is right in front of you on Government's Exhibit 44 for identification? A. Yes, sir.

Q. And you changed the beneficiary from what to what? A. From Phillip Himmelfarb——

Mr. Katz: Just a moment. That is objected to. There isn't any foundation for that.

The Court: There is no foundation for that question.

Q. (By Mr. Strong): Did you have any discussions with the defendant Phillip Himmelfarb as to change of beneficiary? A. Yes. [767]

Mr. Katz: Objected to as leading and suggestive.

The Court: It is answered. Go ahead.

Q. (By Mr. Strong): About when?

A. Sometime previous to August 1st, 1944.

Q. Approximately when?

A. It must have been sometime in July.

(Testimony of David L. Gorgerty.)

Q. Where was it?

A. At the plant where Phillip was operating.

Q. Who is Phillip?

A. Phillip Himmelfarb, at 3301 East Vernon Street.

Q. Who was present?

A. Phillip Himmelfarb and Sam Ormont.

Q. Will you state what was said by either Phillip Himmelfarb or Sam Ormont in that conversation as to the beneficiary?

Mr. Katz: Objected to as no proper foundation laid, incompetent, irrelevant and immaterial, not within the issues of this case.

Mr. Robnett: I join in that objection for Mr. Ormont.

The Court: Overruled as to both defendants.

Q. (By Mr. Strong): State what you said.

A. At the address that I mentioned, Mr. Himmelfarb introduced me to Sam Ormont and said, "Dave, this is my partner, [768] and I want to change the fire insurance on our stock so it covers myself and Sam doing business as the Acme Meat Company." And I wrote the instructions down——

Q. Is that the end of the conversation?

A. Oh, we might have talked about other things while we were there.

Q. Then did you subsequently have prepared the change of beneficiary. A. I did not.

Q. Will you look at the form, Standard Forms Bureau Form 446, which is attached to the front page of Government's Exhibit 44 for identification.

(Testimony of David L. Gorgerty.)

Did you have that issued pursuant to that conversation? A. I did.

Q. Where is the original of that policy?

A. In the hands of Phillip Himmelfarb and Sam Ormont, as far as I know. It was delivered to them.

Mr. Strong: I offer this document in evidence, your Honor.

The Court: That is a true and correct copy of it?

The Witness: Yes, your Honor, it is.

Mr. Robnett: I move to strike out the witness' answer as a conclusion of the witness. He says as far as he knows.

Mr. Strong: He said he delivered it to them.

The Witness: I said I delivered it to them.

Mr. Robnett: He said as far as he knows he delivered it to them.

The Witness: I delivered it to them, if that will make it more specific to you.

The Court: The motion is denied.

Mr. Strong: I offer Government Exhibit 44 for identification in evidence.

The Court: Admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 44.)

Q. (By Mr. Strong): I show you Government's Exhibit 45 for identification and will you state what that is, if you know?

A. Monthly reports of values.

(Testimony of David L. Gorgerty.)

The Court: Are there several?

The Witness: There are five.

Q. (By Mr. Strong): Will you state what months they are?

A. From May 3, 1944 to June 3, 1944, and June 3, 1944 to July 3, 1944, July 3, 1944 to August 3, 1944, and August 3, 1944 to September 3, 1944, September 3, 1944 to October 3, 1944.

Q. Have they any relation to the policy, Government's Exhibit 44?

A. These are reports that are made on what we call a [770] monthly reporting form——

Mr. Robnett: I object to the question as asking for a conclusion of the witness, that they are related to it.

The Court: Yes. Objection sustained.

Q. (By Mr. Strong): Will you state what those are with reference to Government's Exhibit 44?

A. Government's Exhibit 44 is what we call a monthly reporting fire insurance policy on which the beneficiary reports monthly the amount of merchandise and stock on hand for premium computation purposes.

Q. What is Government's Exhibit 45 for identification, if you know?

A. It is the monthly reports that were made showing the values of merchandise and stock on hand that was insured under the policy as I described in Exhibit 44.

(Testimony of David L. Gorgerty.)

Q. For what company?

A. The Acme Meat Company.

Q. Are you acquainted with the signature of the defendant Phillip Himmelfarb? A. I am.

Q. Have you seen him sign it in your presence?

A. Yes, sir.

Q. Would you examine those four or five pages which constitute Government's Exhibit 45 for identification and [771] state whether that is the signature of Phillip Himmelfarb. A. Yes, sir.

Mr. Strong: I offer Government's Exhibit 45 for identification in evidence.

Mr. Robnett: I would like to be able to see them. I have never seen them, your Honor.

The Court: Haven't you seen either one of the documents?

Mr. Robnett: No, I haven't seen them. Counsel said he wasn't offering them against my client, but it developed his name came into it. I would like to see them before the ruling is made.

Mr. Strong: I am sorry. I thought I had shown it to him but I guess I hadn't.

The Court: On the insurance policy you can make your basis for a motion to strike.

On Exhibit 45, were those received by you?

The Witness: I made them out and Himmelfarb signed them and gave me the information that was on them and I filled them in and sent them in to the company.

The Court: You sent them to the company?

The Witness: That is right.

(Testimony of David L. Gorgerty.)

The Court: On or about the date each one of them bears?

The Witness: That is right.

Mr. Robnett: If the Court please, on behalf of Sam Ormont, as to the offer of Exhibit 45 for identification, I [772] wish to make this objection to the first page thereof—there are several pages, your Honor—the first page, on the ground that it is incompetent, irrelevant and immaterial, hearsay testimony as to my client Sam Ormont, as it shows on the face of it that it was issued to Phillip Himelfarb, doing business as Phillip's Meat Company. Then is written afterwards in pen and ink—that has not been proven, no foundation laid to show who wrote it—Acme Meat Company. It does not purport to be any document against Sam Ormont.

The Court: I think your objection is good as to those documents which bear a date prior to the date of this conversation that he identified. When was it, August? When was it that the two of them were present?

The Witness: When the two were present?

The Court: When the rider was made?

The Witness: Yes, they told me before the rider was made——

The Court: No, no. When was it?

The Witness: Before the rider was made they told me——

The Court: I know, but when was it? Was it August?

(Testimony of David L. Gorgerty.)

The Witness: Sometime before the 1st of August.

The Court: All right. That is all I wanted to know.

Mr. Robnett: I wish to object to each and every page of this offer of Exhibit 45 on the ground that it is incompetent, irrelevant and immaterial, hearsay testimony, not binding upon [773] Mr. Ormont and no proof or any foundation for the admission as against Mr. Ormont.

The Court: Let me see the document.

(The documents referred to were passed to the Court.)

Mr. Katz: Before your Honor rules I would like to examine the witness on voir dire with respect to these documents.

Mr. Strong: May I say something, your Honor?

The Court: Just a moment.

Mr. Witness, the signature Phillip Himmelfarb there is Phillip Himmelfarb?

The Witness: That is right.

The Court: And Acme Meat Company, you wrote that?

The Witness: That is my writing.

The Court: And you wrote Acme Meat Company up here?

The Witness: I did. That is when the change was made.

The Court: June 3, 1944?

The Witness: That is right.

(Testimony of David L. Gorgerty.)

The Court: This was before the change was made, was it not?

The Witness: No, when they told me to do this then I turned in these reports to the company showing that the change had been made and the indorsement was issued afterwards.

Mr. Strong: May I call this to your Honor's attention, Government's Exhibit 44 shows that the indorsement making the change is dated May 20, 1944? [774]

The Court: May 20th?

Mr. Strong: Yes, your Honor.

The Court: And the conversation was not until August?

The Witness: No, the conversation was sometime prior to August when the transfer was made over to the Acme Meat Company. And whatever this indorsement shows here is the time that the conversation was had when they told me to change it to the Acme Meat Company.

The Court: That is, May 20, 1944?

The Witness: That is right.

The Court: Then it wasn't August?

The Witness: This other indorsement is dated August and I said sometime prior to August. This is dated in May.

The Court: If this was dated in May, that is when you had your conversation with the two of them?

The Witness: That is right, just a few days

(Testimony of David L. Gorgerty.)

before that, and then I notified the company and in due course I got the indorsement.

The Court: The objections are overruled. I think that on voir dire, I do not believe you would be entitled to examine at this time, but you may reserve that for cross examination.

Mr. Strong: That is as to 44 and 45, your Honor?

Mr. Robnett: I haven't seen 44. He offered the other [775] one first.

The Court: I have already admitted Exhibit 44 but you may make a motion to strike. You may state your grounds for the record.

Mr. Robnett: I object to the introduction of Exhibit 44 and I would like to have my objection precede the ruling of the Court.

The Court: You may state it and it will be stated as a basis for a motion to strike.

Mr. Robnett: Thank you.

I object to it as incompetent, irrelevant and immaterial, hearsay as to Sam Ormont, and not binding upon him in any manner, shape or form, there is no foundation laid to show that he authorized any changes or had anything to do with this document, and that his name did not appear therein excepting someone has put it in in pencil on the face of it, and that the rider dated May 20, 1944 is merely typewritten and is not signed by anyone and therefore would not be binding upon anybody, even the company that wrote the policy.

The Court: That is the copy.

(Testimony of David L. Gorgerty.)

Mr. Robnett: Oh, this is the copy?

The Court: Yes; that is the copy. He testified that the original was delivered to Himmelfarb, the other defendant.

Mr. Robnett: As I said, there is no foundation laid to introduce this instrument against Mr. Ormont as proof of any of the issues of this case, and in addition that it contains [776] considerable amount of hearsay on the back thereof as it contains five purported letters between——

Mr. Strong: I am not offering the letters. I will take them off.

Mr. Robnett: They are on it. There is a lot of correspondence between parties that are not parties to this action, and there is no foundation that Mr. Ormont knew them or anything about them.

The Court: Were those part of the policy or are those just letters?

The Witness: No, these letters were not part of the policy.

The Court: Very well.

Mr. Strong: May I physically remove them? May I have the witness state what is part of the policy so I can tear off the documents that are not part of the policy?

The Court: Very well.

Q. (By Mr. Strong): Just show me what is or what is not part of the policy.

A. (Examining documents.)

Mr. Strong: I am physically removing all of the papers which the witness has indicated are not part

(Testimony of David L. Gorgerty.)

of the policy and I am not offering them as part of Government's Exhibit 44.

The Court: They may remain marked for identification, [777] however, in case any of the parties want to have recourse to them as 44-A.

(The document referred to was marked Government's Exhibit No. 44-A for identification.)

Mr. Robnett: I would like the privilege of asking the witness one or two questions, your Honor, before ruling on my objection.

The Court: I think sufficient foundation has been laid to admit the documents.

Mr. Robnett: That is the point I wanted to ask him. He has testified that he delivered a policy to the two defendants, the two individuals.

The Court: He testified that he had a conversation with Phillip Himmelfarb and Sam Ormont and they told him they wanted him to change this policy from Phillip's Meat Company to the Acme Meat Company, that he said, "Meet my partner, Mr. Ormont," and then he delivered the original, of which this copy is a copy, of the policy to Phillip Himmelfarb in accordance with that conversation. So what more is there needed?

Mr. Robnett: My understanding of the testimony of the witness, your Honor—if I am wrong why I am sorry—was that Mr. Himmelfarb made a statement, that he has not testified that Mr. Sam Ormont made any statement whatsoever about the partnership, that Mr. Himmelfarb made the state-

(Testimony of David L. Gorgerty.)

ment. He also testified, as I recall, that he delivered the original [778] policy to Mr. Himmelfarb and Mr. Ormont. Now I want to find out from him as to which one he delivered it to or whether he handed it to the two of them at once, what he means by that. I think it is his conclusion as to delivering it to the two of them.

The Court: I think you can cover that on cross-examination. The documents are admitted in evidence. If any testimony develops as a basis for a motion to strike, I will give it consideration.

(The document referred to was received in evidence and marked Government's Exhibit No. 45.)

Mr. Strong: That is all the questions I have.

The Court: Cross examine. Mr. Katz?

Cross-Examination

By Mr. Katz:

Q. Mr. Gorgerty, I believe that you have Exhibits 44 and 45 before you.

The Clerk: No, he doesn't.

(The documents referred to were passed to the witness.)

Q. (By Mr. Katz): Exhibit 44 which you now have before you, Mr. Gorgerty, is a copy of a policy that was issued to Phillip Himmelfarb, doing business as Phillip's Meat Company, is that correct?

A. That is correct.

Q. When was that policy first issued as a reis-

(Testimony of David L. Gorgerty.)

suance of [779] another policy previously cancelled?

A. This policy was issued on the 3rd day of April, 1944.

Q. In the manner that you have just stated, namely, to Phillip Himmelfarb doing business as Phillip's Meat Company, is that correct?

A. That is right.

Q. And the policy that was previously cancelled and which this policy was issued in lieu of was likewise issued to Phillip Himmelfarb doing business as Phillip's Meat Company?

A. That is correct.

Q. Now sometime subsequent to May 1st you visited Mr. Himmelfarb at his place of business, is that correct?

A. That is right.

Q. At that time was he still doing business as Phillip's Meat Company? Was that the place that you had called at when he was doing business as Phillip's Meat Company?

A. Yes, sir.

Q. And when you arrived there you were introduced to Mr. Ormont, is that correct?

A. That is correct.

Q. Now upon first coming in I take it that you exchanged greetings with Mr. Himmelfarb, whom you had known? [780]

A. That is right.

Q. Had you known Mr. Ormont previous to that?

A. I had an acquaintance with him, yes. I had been introduced to him and I knew who he was.

Q. You had been introduced to him prior to the time you had come down on this occasion that

(Testimony of David L. Gorgerty.)

you testified that you had a conversation with Mr. Himmelfarb about the transfer of the policy that is Exhibit 44? A. Yes, sir.

Q. Where had you previously met Mr. Ormont?

A. At 3301 East Vernon Street where Himmelfarb was doing business as Phillip's Meat Company.

Q. You had previously met him in that place of business? A. Yes.

Q. Do you recall how long previously you had met Mr. Ormont there?

A. Oh, several months. He was in and out of there.

Q. On this particular occasion when you walked in and after you had exchanged greetings with Mr. Himmelfarb, Mr. Himmelfarb said to you, "I want you to meet Mr. Ormont, my partner"?

A. That is right.

Q. You then said, "Hello," to Mr. Ormont?

A. Certainly. [781]

Q. Did you then discuss matters generally that didn't pertain to this insurance policy?

A. Yes, sir.

Q. You spent some little time discussing general matters? A. That is right.

Q. Then after such general discussion Mr. Himmelfarb told you that the policy that he had and that had been issued to Phillip's Meat Company, he wanted that transferred to Acme Meat Company if it could be done, is that correct?

A. That is correct.

Q. And upon the basis of that statement, that Mr. Himmelfarb told you he wanted it transferred

(Testimony of David L. Gorgerty.)

to Acme Meat Company if it could be done, you proceeded to have the transfer made?

A. That is right.

Q. Now at the time that Mr. Himmelfarb told you, introduced you to Mr. Ormont as his partner, did he at that time tell you whether or not Mr. Ormont was his partner in the Acme Meat Company or any other enterprise or enterprises?

A. Will you read that question to me?

(The question referred to was read by the reporter as set forth above.)

The Witness: He told me that he and Mr. Ormont were partners doing business as the Acme Meat Company. [782]

Q. (By Mr. Katz): He told you that at the time he introduced you?

A. Yes, or while we were in conversation immediately afterwards.

Q. And it was in substantially that language, that he and Mr. Ormont were doing business as partners in the Acme Meat Company?

A. That is right.

Q. And you made a note of that fact in order to have the insurance policy so issued?

A. I wrote it down on a memorandum so that I would have it issued as they had directed.

Q. And in order to have it issued properly and correctly you made a notation as to the name of Mr. Ormont and a spelling thereof? A. Yes, sir.

Q. And was the policy issued as you had noted that name?

(Testimony of David L. Gorgerty.)

A. The indorsement is issued "A-r-m-o-n-t."

Q. Was that the way that you had noted the name?

A. Probably not. I think his name starts with "O."

Q. You say probably not. Do you recall whether you did or did not note the name?

A. I know enough about my writing to know that my "O's" and "A's" are very often mistaken.

The Court: By you?

The Witness: Sometimes.

Q. (By Mr. Katz): Well, now, I will call your attention to the name Sam Armont and the symbol for and appearing on the copy, Exhibit 44, and I will ask you whether or not that is your writing.

A. No.

Q. Do you know whose writing that is?

A. I haven't any idea. Probably an underwriter in the office that wrote the policy.

Q. That wasn't made by you? A. No, sir.

Q. You will note that the "A" there is a printed type of an A? A. That is right.

Q. Where did you make your notation, Mr. Gorgerty, with respect to how or in what names the policy was to be issued?

A. I made it on a slip of paper that I had in my pocket or a notebook that I might have carried.

Q. You presented the slip of paper with the names on it as you had written it to the underwriter that issued the policy?

A. I think I didn't; I think I telephoned it. [784]

(Testimony of David L. Gorgerty.)

Q. Mr. Gorgerty, do you recall whether or not the original request that the policy be transferred from Phillip Himmelfarb to the Acme Meat Company was one that came to you by way of telephone?

A. Well, Phillip might have told me over the phone and then I went to the place of business and wrote down the information there because I recall talking with he and Ormont at the time and before that time Phillip told me that he thought he would go in partnership with Ormont. [785]

Mr. Katz: I move to strike that, if the Court please.

Mr. Strong: No, I think that is very important.

The Witness: —that he had a packing plant at Southgate—

The Court: Wait.

The Witness: Excuse me.

The Court: Motion denied.

Q. (By Mr. Katz): Will you take a look at Exhibit 45, that is before you, Mr. Gorgerty. Did you fill this out?

Mr. Strong: Your Honor, I think that is a little confusing. There are number of documents, and various things on it.

The Court: I don't think it is confusing. He has been there.

Mr. Strong: It is confusing me, I should have said.

The Court: The question is, did you fill them out?

(Testimony of David L. Gorgerty.)

The Witness: If you mean I entered in the figures, I did.

The Court: The other writing—they are blank forms filled in with typewriting and pen and ink, did you do any or all of it?

The Witness: I filled in the figures that I inserted with a pen, and I believe that I had the forms typed so that they could be filled in.

Q. (By Mr. Katz): It is true, isn't it, that the typewriting that appears on each page of these exhibits were typed in by you, or [786] someone at your office? A. Probably so, yes.

Q. You know that to be undoubtedly so, don't you?

A. I know that Himmelfarb or Ormont did not type them in, if that is what you want to know.

Q. And they were typed in by you or——

A. At my request.

Q. Someone at your request?

A. That's right.

Q. At your office? A. That's right.

Q. In addition to typing the first page, I will call your attention to the writing "Acme Meat Company" that appears on the line following the typing "Phillip Himmelfarb d.b.a." doing business as "Phillip's Meat Company," and ask you whether the writing "Acme Meat Company" is in your handwriting? A. It is.

Q. I want now to call your attention to the figures in the column and on the line opposite the words and figures: 1 Cal. 301 East Vernon, \$3,000.00.

(Testimony of David L. Gorgerty.)

I will ask you if you wrote that in. A. I did.

The Court: One what, a cow?

Mr. Katz: C-a-l, an abbreviation for California.

The Court: I thought you said one cow. [787]

Mr. Katz: No, your Honor.

Q. I will call your attention to the date, June 3, 1944, and I will ask you whether or not that is in your handwriting. A. It is.

Q. And I will call your attention to the words "Acme Meat Company" appearing above the signature "Phillip Himmelfarb" and ask you if you wrote that in? A. I did.

Q. And isn't it true that everything upon the page that I have just shown you, other than the signature, was typed in or written in by you?

The Court: He just said it was.

Mr. Katz: I just wanted to cover it all, so there will be no question that there is nothing else on there that I have not referred to, your Honor.

The Court: Awhile ago you asked him if everything—everything means everything.

Mr. Katz: If I have covered it, that's fine.

Q. Isn't it also true that the statement, and all the other pages constituting Exhibit 45, were signed by Mr. Himmelfarb in blank, delivered to you, and you filled out whatever appears on it? A. No.

Q. Let us go back now to the first one. Is it true with respect to the first one? [788]

A. That's right.

Q. I call your attention to the second page. Is it likewise true that all the typing on that page was

(Testimony of David L. Gorgerty.)

done by you, or someone at your request, in your office?

A. That's right.

Q. I will call your attention——

The Court: All the handwriting except the words "Phillip Himmelfarb"?

The Witness: I signed the name "Himmelfarb" to it, Judge.

The Court: On the second one?

The Witness: Yes, sir, and on the third, and on the fourth one, and on the fifth one.

The Court: In other words, you filled in the second, third and fourth and fifth completely?

The Witness: That's right.

The Court: Entirely?

The Witness: That's right.

The Court: And signed it in typewriting or in ink or pencil, or whatever it is?

The Witness: That is correct.

Q. (By Mr. Katz): Do you know that the first page bears the signature of Mr. Phillip Himmelfarb?

A. That is correct.

Q. Except for that signature everything else was filled [789] in by you?

A. That's right.

Q. On all of the others, except the first page, everything that is filled in by you, including the signature of Mr. Himmelfarb?

A. That's right.

Q. Isn't it true that what was actually done, there was telephoned in to you the amount, which you inserted in figures on these exhibits, and proceeded to get them up and sign them?

(Testimony of David L. Gorgerty.)

A. Some of them, the figures were phoned in, and some of them I got at the plant.

Q. Irrespective of whether they were phoned in, or whether you got them at the plant, you filled in all of the Exhibit 45 save and except the signature on the first page? A. That's right.

Q. At your office, did you not?

A. That's right.

Q. Isn't it true that the defendant, Phillip Himmelfarb never saw the last four of the five sheets that constitute Exhibit 45? A. That's right.

Q. And isn't it true that when he did see the first page of Exhibit 45, it was in blank, and signed it that way?

A. Yes, when he first saw it it was in blank, and he had signed it that way. [790]

Q. And you took the blank document, signed by him, to your office, and had it filled in?

A. No, let's get this straight now. I had all of this typed, and I took them down, and Phillip signed them.

The Court: Signed what?

The Witness: These reports in blank. He signed enough of them for twelve month's reports.

The Court: Yes.

The Witness: Then when they changed over to the Acme Meat Company, the first one, that was the last one of the Phillip's Meat Company.

The Court: Which is the first sheet of that?

The Witness: Which is the first sheet of that.

The Court: Which the last time you saw it,

(Testimony of David L. Gorgerty.)

it was in blank before you filled it out?

The Witness: It had this writing, but it did not have any amount filled in.

The Court: Not the words "Acme Meat Company?"

The Witness: No, Acme Meat Company was not on the bottom of it at that time.

Q. (By Mr. Katz): Now, Mr. Gorgerty, isn't it a fact that the first page of Exhibit 45 was one of the twelve statements signed in blank by the defendant Himmelfarb in connection with the policy issued to Phillip Himmelfarb doing business as Phillip's Meat [791] Company?

A. That's right.

The Court: He just said that.

Mr. Katz: And after the first one was filed, you did not use the rest of the twelve statements he had signed in blank, but proceeded to sign the statements for him in connection with the change of policy?

A. That's right.

Mr. Katz: If the court please, on the basis of the testimony elicited by this witness, I move to strike that document from evidence, which was the purpose of my request for voir dire, to establish that the Exhibit 45 was never seen by the defendant, never written by the defendant, and never made by him.

Mr. Strong: May I ask one or two questions.

The Court: Yes.

Q. (By Mr. Strong): Those pages which are Government's Exhibit 45, are they the originals, or

(Testimony of David L. Gorgerty.)

carbon copies? A. They are the originals.

Q. Will you state how you happened to sign Phillip Himmelfarb's name where you said you had signed it?

Mr. Robnett: I object to this as hearsay testimony, if the Court please, against Mr. Ormont.

Mr. Katz: I object, as calling for the conclusion of the [792] witness, incompetent, irrelevant and immaterial.

The Court: Yes. This is, I think, a good time to have a recess. Remember the admonition.

(Short recess.) [793]

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

The Court: Your motion was to strike Exhibit 45?

Mr. Katz: Yes, your Honor.

The Court: Do you have something to say?

Mr. Strong: Something to say, or something to ask him?

The Court: You have further questions?

Mr. Strong: Yes.

The Court: Proceed.

Q. (By Mr. Strong): Did you have any conversation with the defendant Himmelfarb as to signing any documents on his behalf?

A. Yes, sir.

Q. When was that?

(Testimony of David L. Gorgerty.)

A. About the time we started in with the Acme Meat Company. I had made out these reports for the Phillips Meat Company——

Mr. Robnett: I move to strike out that he made out the reports, as not responsive. He has already answered the question.

The Court: He answered yes, he did have a conversation.

The Witness: Yes. [794]

Q. (By Mr. Strong): Who was present?

A. Phillip Himmelfarb and Ormont.

Q. Where was the conversation?

A. At the plant.

The Court: Is this the same conversation that you referred to before?

The Witness: I think it was in the same conversation. If not, it was in the next week or so, but it was a part of the same transaction.

The Court: The same parties present?

The Witness: Yes.

Q. (By Mr. Strong): What was said?

Mr. Katz: Objected to as incompetent, irrelevant and immaterial, and having no bearing upon the issues in this case, if the Court please.

The Court: Overruled.

Mr. Strong: Go ahead.

A. Phillip said: Go ahead and sign my reports, and send them in, because we are too busy down here.

Q. Who is Phillip? A. Himmelfarb.

Mr. Strong: That is all.

(Testimony of David L. Gorgerty.)

Q. (By Mr. Katz): The conversation that you have just referred to was [795] before the policy was changed and transferred over from Phillip's Meat Company to the Acme Meat Company, was it not? A. No, sir.

Q. Was it after that time?

A. Yes, sir, Himmelfarb had signed all of the blanks for the policy, while he was doing business as Phillip's Meat Company.

Q. He had signed twelve of those blanks?

A. Yes.

Q. In connection with the other policy?

A. That's right, in connection with this policy.

Q. In connection with this policy, prior to the transfer of it from the Phillips Meat Company to the Acme Meat Company? A. That's right.

Q. The conversation that you had with Mr. Phillip Himmelfarb, at which you stated Mr. Ormont was present, was prior to the time that the policy was transferred and changed over, wasn't it?

A. We had a conversation prior to the time it was changed over, yes, sir, and several conversations after it was changed over.

The Court: No, the conversation that you referred to is the one he is talking about, where he told you to go ahead and sign the reports, was that before or after the change of policy?

The Witness: It was after the change of policy. Otherwise, I would not have signed it, if they were all signed by Himmelfarb.

Mr. Katz: I object, if the Court please, as not

(Testimony of David L. Gorgerty.)

responsive, and calling for the opinion of the witness.

The Court: It may be stricken, and the jury instructed to disregard his answer after the word "otherwise."

Q. (By Mr. Katz): Will you take a look at the policy, Exhibit 44, and please tell us what the date is that that policy was transferred and changed over from the Phillips Meat Company to the Acme Meat Company? A. May 20, 1944.

Q. Also tell us on what date it was that you had this conversation that you have referred to, with the defendant Phillip Himmelfarb, at which you stated Mr. Ormont was present?

A. A few days prior to May 20th.

Q. A few days prior to May 20th?

A. Yes.

Q. I will now ask you if it is not true that that conversation took place before that policy was changed and transferred over from the Phillip's Meat Company to the Acme Meat Company?

Mr. Strong: I object to that. There are several conversations. Just to say "that conversation" does not identify it. We are speaking of where certain statements were made. [797]

The Court: That is what he is talking about. I think the witness knows that.

The Witness: Please read the question.

(Question read by the reporter.)

The Court: By "that conversation" you mean the conversation alluded to, where Himmelfarb told him to fill out his reports?

(Testimony of David L. Gorgerty.)

Mr. Katz: That's right, your Honor, precisely.

The Witness: Himmelfarb told me to sign his name to the reports.

Q. That was not the question.

A. The conversation in which Himmelfarb told me to sign the reports?

Q. Yes.

A. Was after the policy was transferred over to the Acme Meat Company.

Q. On what date was it that you had this conversation that you have just referred to?

A. I would not know any more than you would what date you went fishing or skating last year.

The Court: That is a conclusion of the witness. Moreover it assumes it assumes a fact not in evidence.

The Witness: He didn't catch any fish anyway.

Mr. Strong: There is no skating in California, your Honor.

The Court: Oh, yes. [798]

Mr. Strong: Outdoors.

Mr. Katz: Didn't you testify just a few minutes ago that the conversation took place prior to May 20?

Mr. Strong: Your Honor, that has already been asked and answered.

The Court: I think that is argumentative. [799]

Q. (By Mr. Katz): You had a conversation with Mr. Phillip Himmelfarb before the policy was transferred, did you not? A. Certainly.

Q. Do you recall how long before the policy was transferred that you had that conversation?

(Testimony of David L. Gorgerty.)

A. Well, it was immediately before.

Q. When you say "immediately" does that refer to days or weeks or hours?

A. Well, this policy was transferred——

The Court: No, no.

The Witness: May I explain, Judge, how these transactions are handled?

The Court: I think you have explained that.

The Witness: Will you please read the question again?

(The question referred to was read by the reporter as follows:

("Q. When you say 'immediately' does that refer to days or weeks or hours?")

The Witness: A day or so before the indorsement.

Q. (By Mr. Katz): When did you next see Mr. Phillip Himmelfarb again?

A. When I took the indorsement over to him, changing it from the Phillip's Meat Company to the Acme Meat Company.

Q. How long was that after May 20th? [800]

A. Probably four or five days.

The Court: Who was present then?

The Witness: Ormont and Phil were there nearly every time I went there.

The Court: Were they there at that time?

The Witness: I would say they were.

(Testimony of David L. Gorgerty.)

Q. (By Mr. Katz): Do you recall whether they were there on that occasion?

A. I don't recall of very many occasions where they were not there.

The Court: Strike the answer. Read the question again.

(The question referred to was read by the reporter as follows:

("Q. Do you recall whether they were there on that occasion?")

The Witness: I would say they were.

Q. (By Mr. Katz): Is that based upon your recollection of the fact or because you know them to be there on most occasions that you went there?

A. Well, they were there most of the time.

Q. That is the reason you made the statement?

A. I would say that they were there that day.

Q. Now with reference to the matter of the statements, [801] wasn't that taken up by you with Mr. Himmelfarb at the time that you first discussed with him the matter of the indorsement and transfer over of this policy?

A. I think I just answered that question.

Q. I don't recall having asked it so may we have an answer to it?

The Court: Yes.

The Witness: Will you read the question?

(The question referred to was read by the reporter as follows:

("Q. Now with reference to the matter of

(Testimony of David L. Gorgerty.)

the statements, wasn't that taken up by you with Mr. Himmelfarb at the time when you first discussed with him the matter of the indorsement and transfer over of this policy?")

Mr. Strong: Well, your Honor, I think that has been gone into time and again. I object to it.

The Court: Objection overruled.

The Witness: It was taken up with him at the time and again after the policy was transferred over.

Q. (By Mr. Katz): He talked about that on more than one occasion? A. That is right.

Q. Now you personally took the indorsement to Mr. Phillip Himmelfarb? [802] A. Yes, sir.

Q. You personally delivered the policy after it was changed over?

A. They had the policy. I never got it back. All I took was the indorsement changing it over.

Q. Mr. Gorgerty, I will ask you to look at Exhibit 44 and please state whether or not the original of the policy has the words that are written in on this copy, the symbol and, Sam Ormont, that appear between the words Phillip Himmelfarb and the letters dba, a line through Phillip's Meat Company and the words Acme Meat Company?

Mr. Strong: Objected to because the witness indicated he didn't have the original policy.

The Court: Objection overruled.

The Witness: Will you repeat the question?

(The question referred to was read by the reporter as set forth above.)

(Testimony of David L. Gorgerty.)

The Witness: I would say that the original policy does not have that typed in there.

Q. (By Mr. Katz): Now, Mr. Gorgerty, were you mistaken when you told the Court, in response to a question the Court asked you, that this was a true copy of the original?

A. It is, it is, but I am going to explain to the Court that you are trying to twist the witness——

Mr. Katz: Well, that isn't—just a moment.

The Witness: That what you are referring to——

Mr. Katz: If the Court please, I do not believe that is a fair and proper and accurate statement.

The Court: No, it is not, Mr. Witness. The jury are instructed to disregard the witness' comment.

The Witness: What you have here——

The Court: Do not try to see what he is trying to do to you, just see whether you can answer the question.

The Witness: I can take care of myself, Judge.

What you are referring to here is the underwriter's notation.

The Court: Do you want to make an explanation of your answer, that you said it was a true copy of the original?

The Witness: That is right. This is a true copy of the original except that the underwriter has made some notations on this which are not included on the original policy, and Sam Ormont, and the line drawn through Acme Meat and the

(Testimony of David L. Gorgerty.)

Acme Meat which is typed in here with a pencil were not on the original policy.

Q. (By Mr. Katz): And so far as you know still are not on the original policy?

A. That is right.

Q. And it is true, is it not, that that policy that you [804] have there with the words and figures on it, whether written in typewriting or printed is not an exact or true or correct copy of the original?

A. In answer to that question, this is a true copy of the original which was delivered in this transaction except for the part that is above the amount of \$10,000, which is underwriting information only, and not on the original policy, and the penciled letters of Sam Ormont and the sign and a pencil line through the Phillip's Meat Company and Acme Meat Company by pencil. This is a true copy with that exception, including the indorsements that are attached to the policy.

Q. Mr. Witness, if this copy were different and unlike the original then it would not be a true copy of the original, is that correct?

The Court: That is argumentative.

Mr. Katz: Yes, your Honor. I submit that it is.

Q. The original policy does not read Phillip Himmelfarb and Sam Ormont dba Acme Meat Company, does it?

The Court: He just got through answering that question.

Mr. Katz: I will withdraw it, your Honor.

Q. You didn't deliver the original of that policy to Himmelfarb and Sam Ormont, did you?

(Testimony of David L. Gorgerty.)

A. I delivered it to Phillip Himmelfarb.

Q. When [805]

A. A few days after the third of April, 1944.

Q. Were you mistaken when, in response to a question that Mr. Strong put to you, you stated that the policy was delivered by you to Mr. Himmelfarb and Mr. Ormont?

A. I didn't make that statement.

Mr. Strong: Objected to, your Honor. The witness didn't so testify. There are different deliveries and it isn't clear from the questions which one counsel means.

The Court: I understood that the witness had testified to that but I think it has been straightened out since. He delivered the rider.

The Witness: That is right.

Mr. Strong: Yes.

Q. (By Mr. Katz): You didn't mean to state that you delivered the policy to Mr. Himmelfarb and Mr. Ormont?

A. No, I never delivered the policy to Himmelfarb and Ormont, I delivered it to Himmelfarb. I delivered the rider to Ormont and Himmelfarb when it was changed over to the Acme Meat Company.

Q. Where did you deliver that rider?

A. 3301 East Vernon Street, in Vernon, California.

Q. Who was present at that time?

A. Ormont and Himmelfarb.

Q. Was anyone else present? [806]

(Testimony of David L. Gorgerty.)

A. Not that I recall of. There was a Captain Blackman there a few times when I called on business affairs.

Q. When you delivered that indorsement, how did you deliver it?

A. Just like you deliver a letter, you hand it to a fellow and say, here it is. It was in an envelope.

Q. Who did you hand it to?

A. That is right.

Q. I say, who did you hand it to?

A. To Phillip Himmelfarb.

Q. To Phillip Himmelfarb?

A. That is right.

Q. And that was what you meant when you said you delivered it to both of them, is that you handed it to——

A. They were both there and they discussed the matter while we were there.

Q. Was anyone else present at any of these conversations that you had other than yourself and Mr. Ormont and Mr. Himmelfarb?

A. I don't believe there was. The office was pretty small and there wasn't room in there for more than two or three people.

Q. Not at any time? A. No.

Q. What about this Captain Blackman? [807]

A. Captain Blackman I saw two or three times and was introduced to him.

Q. Did he participate or was he present at these conversations?

A. No, he was not. I didn't see Blackman after

(Testimony of David L. Gorgerty.)

Phillip tied up with the Acme Meat Company.

Q. Now, 3301 Vernon Avenue was occupied by companies in the meat business, or persons in the meat business, other than the Phillips Meat Company and the Acme Meat Company, is that correct?

A. Yes, there are I think several other companies doing business at the same location. It is a refrigeration and packing plant.

Q. An on these occasions that you went there to make the deliveries, there were other companies there doing business there?

A. Well, may I explain that this is a large warehouse in which a lot of meat distributing men use space for storage and cooling purposes. The part that was occupied by Phillip Himmelfarb and Sam Ormont was an office about——

The Court: He didn't ask you about that. He just wanted to know if there were others there.

Q. (By Mr. Katz): Do you recall any of the others there at that time? A. No. [808]

Q. You don't recall any of them? A. No.

The Court: What difference does that make?

Mr. Katz: I am trying to find out if this man got into the right office.

Mr. Strong: He identified the defendants, your Honor.

Mr. Katz: Now, if the Court please, I will renew my motion to strike Exhibit 45 and I will also move to strike Exhibit 44. My motion as to Exhibit 44 is predicated upon the fact that that copy was received in evidence upon the testimony that it was a true

(Testimony of David L. Gorgerty.)

copy of the original, which in fact it is not and as it has so been established, and Exhibit 45 on the ground that there was no foundation whatsoever for its admission, those documents and everything on there having been filled in and signed, other than the one that was entirely filled in and signed in blank and never seen by the defendant Phillip Himmelfarb.

The Court: The motion is denied. The jury will disregard the pencil writing on Exhibit No. 44 in accordance with the witness' testimony.

Did you have cross examination of this witness Mr. Robnett?

Mr. Robnett: I wish at this time, if your Honor please, on behalf of Mr. Ormont to move to strike all of Exhibit 45, I believe it is—if I am not mistaken, that is the one of [809] several pages, not the policy—on the ground that it is incompetent, irrelevant and immaterial as to this defendant and there is no proper foundation for its original admission and it should be stricken from the record as to him. It was not authorized by him, he didn't sign any of it and it was not signed by Mr. Himmelfarb excepting as the evidence shows the first page was signed in blank but that the Acme Meat Company was put on there afterwards by this witness, and as to the extra pages than the first page, they weren't even signed, and this witness signed them.

The Court: I think all that goes to the weight which the jury can give to the evidence rather than its admissibility. There is sufficient evidence in to

(Testimony of David L. Gorgerty.)

support allowing it in evidence. The motion to strike will be denied.

Mr. Robnett: I wanted one other point on that, your Honor.

The Court: I am sorry.

Mr. Robnett: The witness testified subsequent to the admission that Mr. Ormont told him, "You go ahead and fill out my reports," in the singular, and I submit that that was not binding upon Mr. Ormont. Mr. Ormont was not called upon, he wasn't even there and heard to say anything because it wasn't referring to any so-called partnership reports at all, yet these reports are filled out as Acme Meat Company.

The Court: I think that sufficient foundation to admit [810] it is in the record. It all goes to the weight of the testimony.

Do you have any further examination of this witness?

Mr. Robnett: No, I have no questions.

The Court: The witness may be excused.

(Witness excused.)

The Court: Next witness.

Mr. Strong: May I fill out his voucher?

The Court: We can be starting to swear in another witness while you are doing that.

Mr. Strong: Mr. Eustice. He has been sworn.

The Court: I thought you had more witnesses.

Mr. Strong: I don't think it is necessary to have more.

The Court: All right, Mr. Eustice.

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resumed the stand and testified further as follows:

The Court: You are proceeding now further with the direct examination of this witness as to the defendant Phillip Himmelfarb?

Mr. Strong: Yes, your Honor.

Mr. Robnett: Not as to Mr. Ormont?

The Court: Not as redirect to Ormont?

Mr. Strong: Not on redirect as to Ormont.

The Court: Very well. [811]

Direct Examination

(Continued)

By Mr. Strong:

Q. Now, Mr. Eustice——

The Court: Pardon me, Mr. Strong. Do you wish at this time to consider having made the offer of proof which you made out of the presence of the jury?

Mr. Strong: Yes, your Honor.

The Court: The offer of proof will be rejected on the grounds I indicated at that time.

Mr. Strong: Yes, your Honor.

Q. In connection with your investigation, Mr. Eustice, into the income tax and the income reported by the defendant Phillip Himmelfarb for the year 1944, you have testified here that you examined certain books and documents of the Acme Meat Company, is that right?

A. Yes, sir, that is correct.

Q. When did this examination take place?

Mr. Katz: Objected to, if the Court please. This

(Testimony of J. Bryant Eustice.)

matter has been asked and answered and it is encompassed within the offer of proof that has been rejected by the Court.

The Court: I do not know that it is encompassed within that. And if he said when the examination took place, I have forgotten it. The objection is overruled.

The Witness: Is that the examination of the books and records of the Acme Meat Company?

The Court: With relation to the defendant Phillip Himmelfarb. Isn't that right?

Mr. Strong: Yes. This is only as to Phillip Himmelfarb.

The Witness: That would be about the latter part of November 1944. [813]

Q. Was it on one, or more than one time that you examined these books and records in that respect? A. More than one time.

Q. How many times?

A. I don't know just how many, but several times.

Q. Approximately?

A. Well, the whole examination of the books and records were also taken into consideration in reference to Phillip Himmelfarb. That is, any information that I might find that had any connection with his income. It was not all spent directly on Phillip Himmelfarb.

Mr. Katz: I move to strike that out, if the Court please, as not responsive to the question.

The Court: Motion denied.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Strong): On the first occasion that you examined the books and records of the Acme Meat Company with reference to the income of Phillip Himmelfarb for the year 1944, where did the examination take place?

A. In the office of the Acme Meat Company.

Q. And who was present?

A. Mr. Phoebus and myself. The bookkeeper of the Acme Meat Company was in the same building.

Q. Who was present with you at the examination? A. Mr. Phoebus. [814]

Q. Where had you obtained the books of the Acme Meat Company on that occasion?

A. At the office of the Acme Meat Company.

Q. Did anyone give them to you?

A. Yes, sir.

Q. Who?

A. Well, the first time I obtained the books, they were given to me by Mr. Berlin, the office manager. Mr. Phoebus had been——

Q. Just what you did.

A. That's what I did, yes, sir.

Q. And did you make a copy of the entries on the records of the Acme Meat Company, on that occasion, with reference to any money paid or received from Mr. Phillip Himmelfarb, or paid to Mr. Phillip Himmelfarb for the year 1944.

Mr. Katz: Objected to, if the Court please, as incompetent, irrelevant and immaterial, having no bearing on any of the issues in this case, and not the best evidence, and hearsay.

(Testimony of J. Bryant Eustice.)

The Court: It calls for a yes or no answer. Did you make any record? The objection will be overruled.

A. What date?

The Court: Read the question.

(Question read by the reporter.)

Mr. Strong: The first occasion that you just got through testifying to. [815]

A. Not on that first day, no, sir.

Q. When did you make a copy of the books and records in that respect?

A. I would say about four weeks later.

Q. Where did that take place?

A. In the office of the Acme Meat Company.

Q. Who was present?

A. Mr. Phoebus and myself.

Q. How did you get the books? Who gave you the books?

A. Well, they were always available after the first time that I went out there; that is, in the office. I just went to the books and went to work on them.

Q. Do you have the entries which you made from those books on that occasion?

A. Yes, sir, I have.

Q. The page you are showing me is a part of Government's Exhibit 40 for identification?

A. Yes, sir, that is correct.

Mr. Strong: Your Honor, it might be simpler if we removed that, and gave it another number, No. 40-A, with your Honor's permission.

(Testimony of J. Bryant Eustice.)

Q. Is that the only page?

A. Just the one page.

The Clerk: We have a 40-A, your Honor.

The Court: 40-B. You said Mr. Berlin was there. The [816] bookkeeper's name is Link, isn't it?

The Witness: The first bookkeeper's name was Link, and Mr. Berlin was bookkeeper at the time I made the audit.

Q. (By Mr. Strong): Looking at Government's Exhibit 40-B for identification, will you state whether that is the transcript which you made of the books and records of the Acme Meat Company, as you just testified? A. Yes, sir, it is.

Q. Do you have the books and records at the present time? A. No, sir.

Q. Where did you last see them?

A. At the office of the Acme Meat Company.

Q. Will you take the income tax return of the defendant, Phillip Himmelfarb, for the year 1944?

A. What number is that, please?

The Court: 4.

A. I haven't got it.

Q. You have it now? A. Yes, sir.

Q. You have already testified as to what books and records you used in connection with your examination of the return for the year 1944, of Himmelfarb, is that right?

A. Yes, sir, I have.

Q. Now, on the basis of the investigation which you made, [817] as you have heretofore testified, did

(Testimony of J. Bryant Eustice.)

you determine whether or not there was any additional income for the defendant Phillip Himmelfarb for the year 1944, over and above that reported on the income tax return of Phillip Himmelfarb for the year 1944?

Mr. Katz: Objected to, if the Court please. No foundation has been laid; it is incompetent, irrelevant and immaterial, and has no bearing upon any issue in the case. It calls for the conclusion of the witness; calls for hearsay; assumes facts not in evidence. With respect, if the Court please, to the matter of that transcript, we object to the use of it as being a hearsay record of a hearsay record.

The Court: Let me hear the question again, will you, Mr. Reporter?

(Question read by the reporter.)

The Court: That calls for his conclusion. This witness is offered as an expert.

Mr. Strong: May I submit that these are questions which were asked as to the other defendant?

The Court: He did not object.

Mr. Strong: This is just preliminary.

The Court: The objection will be overruled, and it will call for a yes or no answer. I think your form is proper—if he determined it, whether or not in his opinion, after an investigation, he was of the opinion that there was unreported income. I think that would be an appropriate question. [818]

Mr. Strong: I will incorporate that language into my question, if I may.

The Witness: The answer is yes.

(Testimony of J. Bryant Eustice.)

Q. Will you take up the summary of adjustments which you have there, and turn to the page with reference to Phillip Himmelfarb for the year 1944.

A. Yes, sir.

Q. And the income tax return for Phillip Himmelfarb for the year 1944?

Mr. Katz: If the Court please, with reference to that summary, I believe that is a matter that was gone into before. It was based upon the working papers that had been excluded, insofar as used in 1941, which was established to be inaccurate, was prepared by others, and is not verified, and is based upon oral statements from persons that are not before this court, and based in part upon documents, and papers that have not been brought into this court. I believe that the summary is subject to the same infirmities as the working papers, and I object to it upon those grounds.

Mr. Strong: The witness testified that he did not use 1941.

The Court: That he did not use the working papers?

Mr. Strong: That's right.

The Court: He has testified he did not use the working papers in making his calculations in relation to Phillip [819] Himmelfarb for 1944 income.

Mr. Katz: The preceding question, if the Court please, was upon the basis of the investigation he made he came to a determination with respect to the income tax. The investigation consisted of the information contained in his working papers, which

(Testimony of J. Bryant Eustice.)

this Court previously distinguished. He said he did not necessarily rely upon, but did use it.

Mr. Strong: That is anticipating what the basis is. We will show what the basis is, as we go along. The witness has already testified that in making up his opinion as to what the additional income is he relied upon the income tax return for the year 1944, his bank records, which are here, and upon other documents and the books and records of the Acme Meat Company, and he specifically pointed out he did not rely upon 1941.

The Court: And whatever information was contained therein. However, he did get that information, and gave consideration to it in his investigation.

Mr. Strong: And rejected it.

The Court: He said that he rejected it; but he gathered the information. He has the information there concerning the man's bank account. He used that to verify certain items, didn't you—the information you had on your working papers?

The Witness: No, not to verify any items, which I made adjustments on. [820]

The Court: He says any items he made adjustments on. He had to verify the source of income, so he had to take that into consideration.

Mr. Strong: This is the same problem we had at the outset of the trial.

The Court: And we are just about in the same place to.

Mr. Strong: Do you mean as to a recess?

(Testimony of J. Bryant Eustice.)

The Court: I don't think it would hurt any to take a recess. I think I will have to sustain the objection, counsel. Mr. Robnett did not make a similar objection on behalf of Ormont when that question was asked. He let all the testimony go in concerning his working papers, and the summary, without objection.

Mr. Strong: But, your Honor, we have already removed the working papers from this phase of the case, by Mr. Katz' questioning.

The Court: I don't think you have removed the working papers. The witness has just now stated, in answer to a question, that he did not use this in any of the sums which he made adjustments on.

Mr. Strong: That is all we are concerned with.

The Court: You cannot be concerned with that. We are concerned with the whole income. You say his whole income was so much, and he actually reported so much. You can't try a tax case just on the basis of those overages without taking [821] into consideration the other. Objection sustained.

Q. (By Mr. Strong): Did you, in preparing this summary of adjustments, take into consideration for any purpose whatsoever any of the figures or items in Government's Exhibit 41 for identification?

Mr. Katz: Objected to, if the Court please. That has been asked and answered a number of times.

The Court: Objection sustained.

Mr. Katz: Thank you, your Honor.

The Court: Don't thank me for anything. If

(Testimony of J. Bryant Eustice.)

you weren't entitled to it I wouldn't give it to you.

Mr. Katz: I appreciate that too.

Mr. Strong: Your Honor, before I go into other phases, there are only six minutes left before 4:30. Can we recess?

The Court: Recess until 10:00 o'clock tomorrow. Remember the admonition.

(Whereupon, at 4:24 o'clock p.m., an adjournment was taken until Thursday, June 5, 1947, at 10:00 o'clock a.m.) [822]

Los Angeles, California, June 5, 1947
10:00 o'clock A.M.

The Court: United States vs. Ormont and Himmelfarb. Mr. Strong, I understand you have a matter to present out of the presence of the jury.

Mr. Strong: I would like to present the matter once and whichever way the ruling goes I won't take any more time during the day and we may get along that much faster.

The Court: Very well.

Mr. Strong: The matter that I desire to present is with reference——

The Court: By the way—may I interrupt you—I have I think six or seven cases set for next Tuesday, OPA cases and counsel telephoned this morning and wanted to know whether or not they should subpoena their witnesses. This is Thursday. When do you think you will conclude?

Mr. Strong: Well, I have at least three more witnesses and I understand from counsel for the defendants that they may have a number of witnesses.

Mr. Robnett: That is correct.

The Court: You will probably have an accountant?

Mr. Robnett: I don't know exactly, of course, until they complete the rest of their case, but we will have a number of witnesses.

The Court: Assuming that a motion for judgment of acquittal [826] is not granted and that you do put on your defense, how long will it take?

Mr. Robnett: It will take a couple of days, anyway, I would say, as far as Mr. Ormont is concerned.

The Court: The reason I am asking if you expect to put an accountant on is because no doubt the Government will exercise the same privilege on cross-examination which you did.

Mr. Robnett: Yes, I understand.

The Court: And that is what takes time.

Mr. Robnett: It could take of course two or three days longer.

Mr. Strong: We won't be finished by Tuesday, your Honor.

The Court: I think then the only thing I can do is to vacate the settings. At the rate we are going here, Mr. Eustice is not finished yet, and you still have him on direct, and if Mr. Katz is going to take as long to cross-examine as Mr. Robnett, he will be on for some little time.

Mr. Clerk, I think you had better advise counsel

on all those cases, and I will make an order vacating the settings now and continuing all the OPA cases until the following week, that is, a week from next Tuesday.

Mr. Robnett: Your Honor, while you are talking about those things, there was a matter that I wanted to ask you about—it has nothing to do with this case—but whether or not the court would be in session in this case on Monday. [827] The reason I inquire is this——

The Court: No, I will not.

Mr. Robnett: You won't be in session?

The Court: I will not be in session, because I have a law and motion calendar and I issued an order to show cause on a writ of habeas corpus that will probably take all day.

Pardon me, Mr. Strong.

Mr. Strong: Yes, your Honor.

The basic proposition I would like to discuss just for a few moments relates to these work papers because they seem to be the stumbling block in the presentation of the Government's evidence as to what the records which are actually used as a basis for computing the income which the Government feels was unreported.

Now these working papers, which your Honor has referred to as not being out of the case, as necessarily being here because, as your Honor stated, these work papers are the basis upon which the Government Agent Eustice determined what the entire income was, and that the Government can't only show what the unreported income is but it has

to show what the entire income was, those work papers, your Honor, don't show anything as to either one of those two things.

The Court: It shows bank accounts though.

Mr. Strong: It shows bank accounts which were not used in determining any part of the income.

The Court: It shows money that went in and out of the bank accounts for that year.

Mr. Strong: Those work papers——

The Court: Apparently I do not make myself clear in connection with the matter. I understand Mr. Eustice's position is that he says he didn't use those in calculating his deficiency, or whatever you call it.

Mr. Strong: He didn't use it for calculating anything.

The Court: Yes, he did. He verified it.

Mr. Strong: He says he didn't.

The Court: I mean, he took them as true. In other words, let us say that the man's income was \$100,000, the Government contends it was \$200,000, and he reported \$100,000, so they come in and say, well, his overage is \$100,000. He reported \$100,000 so we did not take that into consideration in calculating the overage at all, that was all right.

Mr. Strong: But we don't say that at all, your Honor.

The Court: But you do say that.

Let me see the work papers.

Mr. Strong: Not the work papers, I would like to show what we rely on to show what the reported

income is as well as the unreported income. We only rely on four papers, and it isn't the work papers.

The Court: Let me see Exhibit 41.

(The document referred to was passed to the Court.) [829]

The Court: Here is a transcript of his commercial account for 1942, '43 and up to January 24th—well, here is all of 1944—deposits, here are checks, the payees in detail, deposit balances, and so forth. So it cannot be said that Mr. Eustice didn't take this into consideration in his mental processes.

Mr. Strong: May I go one step then beyond that? Our position is that he did not take it into consideration in his mental processes, that the only thing that he took in was Government's Exhibit 40-B for identification, which is a copy of a page of the Acme Meat Company showing amounts of money received by Phillip Himmelfarb during 1944, and he took into consideration Government's Exhibit 4, which is Phillip Himmelfarb's income tax return for the year 1944, also the return of his wife, Ruth Himmelfarb, which is Government's Exhibit No. 5, and he took into consideration Government's Exhibit No. 6, which is a fiscal year return. Those are the only documents which this witness took into consideration in determining, first, what the income was which was reported and in determining, second, how much additional income was unreported. Just these documents.

As a further point, the only purpose of those work papers is to refresh the recollection of the witness.

Assuming he can testify without refreshing his recollection, he could go on testifying and we don't need them at all, but because [830] there are a lot of figures and they are voluminous, he uses them to refresh his recollection.

I submit to your Honor that it isn't necessary in order to permit a witness to refresh his recollection that he be shown again all the documents that he originally used; even if one page of one document will refresh his recollection, we are only dealing with his recollection, not with the contents of the documents.

So even on the basis of his using Government's Exhibit 41 for any purpose, at best he is only using it to refresh his recollection, and here he indicated that he isn't using it to refresh his recollection because the only source of his information is other documents, and not the ones which are marked as Government's Exhibit 41 or anything contained in it.

The Court: The difficulty basically with which you are confronted, and with which I as a judge am confronted in determining, is that all Mr. Eustice's testimony is essentially hearsay testimony. In other words, he comes in here and says he went here, he went there, he went to this, he went to that, and he says this is what I found out. You are not producing a man who said, I gave Phillip Himmelfarb \$50,000 in 1944 on such and such a day.

Mr. Strong: You can't, your Honor. It is the other defendant.

The Court: Maybe you could if you had indicted

them [831] separately, but somebody chose to indict them together.

Mr. Strong: But all that Mr. Eustice is testifying to is not what somebody told him, not what conversations he had, but Mr. Eustice is testifying simply from those four documents, and that is all the whole picture. There is no conversation, nothing else.

The Court: What is that document that you have? That document is copied from a book, isn't it?

Mr. Strong: In the possession of the Acme Meat Company and the defendant Ormont, and this is the best evidence at the present time of what that book contains.

The Court: That is the best evidence so far but it is still hearsay.

Mr. Strong: But as I understand it, it is the best evidence since the defendant has the original and we can't get it.

The Court: I see your position.

Mr. Strong: There can't be anything better than this because we can't get the other one, so this becomes the best evidence.

The Court: It becomes the best evidence but it is still hearsay.

Mr. Strong: That is true, but it is an exception to the hearsay rule because it is a copy of a document which is unavailable, just like a copy of a lost document. [832]

The Court: It is not unavailable because of the fact that it has been destroyed or burned or lost or stolen; it is unavailable because the law says you

cannot have the original. Now if you cannot have the original, you cannot have a copy. I had exactly the same situation in the Rosenwasser case. I suppressed photostats, photographs, of the originals and the Circuit Court of Appeals sustained me. If the original is not available because it is a document in the possession of the defendant, then a copy of it is not available.

Mr. Strong: Provided the copy was illegally obtained, but this was not illegally obtained.

The Court: Of course there was something of the same situation, where they went in and talked to the man and told him that they were entitled to have those documents. They say, "We are Government agents."

Mr. Strong: I think there was a recent case, the Zapp case, that went to the Supreme Court, where the agents did this, they went in and got somebody's check when he didn't even know it and didn't want them to have it. The Supreme Court said that that was all right. They got the check and photostated it and then they returned it without the defendant knowing it, and then they indicted the defendant, and the Supreme Court said that that was perfectly good because they had access to some method and they got the original check although they couldn't use the original because it was in the [833] possession of the defendant but they could use the copy. This is the second best evidence because the copy is in the possession of the defendant.

As a matter of fact, I would like to offer this document in evidence.

The Court: I want you to preserve your record because the situation may eventuate where both sides will appeal. They usually do.

Mr. Strong: May I offer Government's Exhibit 40-B in evidence then and I will re-offer it when the jury comes in just in case there is any argument on it.

The Court: Very well. I will rule on it now.

Do you wish to discuss the situation?

Mr. Katz: Unless the Court feels that a discussion is necessary on that problem. I think the objection I have made and what I have pointed out is good.

The Court: Are you objecting to the introduction of that document?

Mr. Katz: I do object to it, your Honor, on the ground it is hearsay, incompetent, irrelevant and immaterial, no foundation laid, no corpus delicti established. It is inadmissible.

Mr. Strong: This is the corpus delicti. We can't establish it until we establish it. The witness testified that this was a copy of the original record which he made, and the [834] original record is in the possession of the defendant. We issued process here which, through a misconception, it is still not available to us so this becomes the best evidence. The witness testified that it is a copy of the original.

The Court: Having been a prosecutor myself, I can sympathize with you but I must sustain the objection.

Mr. Strong: On the ground that it is hearsay?

The Court: On all the grounds stated.

Do you have some other matters?

Mr. Strong: No.

The Court: Very well. Call the jury down.

(The jury returned to the courtroom at 10:20 o'clock a.m.) [835]

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

The Court: Mr. Eustice.

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the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

The Court: That document was marked separately last evening, was it not?

Mr. Strong: Yes, your Honor.

The Court: Proceed.

Direct Examination

(Continued)

By Mr. Strong:

Q. Mr. Eustice, showing you Government's Exhibit 40-B for identification, I ask you whether you made this copy from the books of the Acme Meat Company? A. Yes, sir, I did.

Q. And did you put down on the document, which is 40-B for identification, all the words and figures as they appeared on the original records of the Acme Meat Company?

(Testimony of J. Bryant Eustice.)

Mr. Katz: Objected to, if the court please, as calling for his conclusion; also not the best evidence. The books and records would show by the best evidence what they contain.

The Court: Your last objection is not good. The first [836] objection is. The objection is sustained on the ground it is his conclusion.

Q. (By Mr. Strong): Will you state what you did, what facts and figures you put down in copying from the Acme Meat Company records onto Government's Exhibit 40-B for identification?

The Court: Without stating the contents.

Q. (By Mr. Strong): Just the general terms, without going into the contents.

A. I copied the exact figures——

Mr. Katz: Objected to, if the court please, as calling for a conclusion of this witness.

The Court: Objection sustained.

Mr. Katz: I move to strike the answer on that ground.

Q. (By Mr. Strong): Now, Mr. Eustice, forgetting Mr. Himmelfarb for a while and to go back to Mr. Ormont——

The Court: Pardon me. This is redirect?

Mr. Strong: Redirect, yes, your Honor.

The Court: Very well.

Redirect Examination

By Mr. Strong:

Q. Will you look at the name at the bottom of the page of Government's Exhibit 1, the income tax return of the defendant [837] Ormont for the year

(Testimony of J. Bryant Eustice.)

1942, and also calling your attention to a slip of paper with computations that you made on cross-examination, which is marked Defendant's Exhibit M, will you examine those two which are now before you? A. Yes, sir.

Q. And in connection with the \$5200 which was reported on the income tax return as salary, and which you testified to that you changed that from salary to partnership income, did you increase the amount of income which you asserted was unreported by the sum of \$5200?

A. No, sir, I did not.

Q. On cross-examination there were questions asked you regarding a sum of \$200 shown on the books of the Acme Meat Company, as you testified, as having come from a Mr. Allen in 1942. Do you remember that?

The Court: Nolan Allen.

The Witness: I remember the item. It did not appear on the books and records of the Acme Meat Company.

Q. (By Mr. Strong): There was a discussion of that amount of \$200. Do you recall that?

A. Yes, sir.

Q. And then there was a discussion as to a payment by Nolan Allen of sum funds in 1941; there was testimony by Mr. Kosdon to a letter—do you remember that? [838]

A. Yes, sir; I do.

Q. As to that \$200, with reference to Mr. Allen,

(Testimony of J. Bryant Eustice.)

did you include that in your computations as additional unreported income for the year 1942?

A. No, sir; I did not.

Q. You were asked on cross-examination as to the practice of sending a bill to the taxpayer where additional unreported income was claimed to exist. Do you remember that? A. Yes, sir.

Q. Do you send those bills?

A. No, sir; I did not.

Q. Do you prepare the bills?

A. No, sir; I do not.

Q. Do you know under what circumstances they are sent?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial, his opinion.

Mr. Strong: This is what was asked on cross-examination.

The Court: Yes, it was gone into. It is a matter of which the court and jury can take judicial notice. When I say "judicial notice," those are things we know, that we are supposed to know, but we don't always know precisely what they are so I will permit the witness to answer the question.

The Witness: The office I work for do not send any bills to the taxpayer.

Q. (By Mr. Strong): Do you know under what circumstances [839] bills are sent when they are sent?

Mr. Robnett: I object to that on the ground it is asking for an opinion of the witness of something

(Testimony of J. Bryant Eustice.)

that he has nothing to do with. It would be hearsay, incompetent, irrelevant and immaterial.

Mr. Strong: That is what I thought on cross-examination, your Honor.

The Court: I think on cross-examination I asked the witness some questions generally and made a statement to the jury. I think that we can take judicial notice of the fact that the Collector of Internal Revenue is the one whose duty and function it is under the law to collect it, and that Mr. Eustice, being an agent, has nothing to do with the collection. His duties and functions are in connection with auditing, calculating and computations.

Q. (By Mr. Strong): Now you were asked some questions on cross-examination as to various bonds which were made out in the name of Sam Ormont and Dora Goldberg, and you were asked as to each of the years 1943 and 1944. Did you, in computing the unreported income which you claim was in existence for the year 1943 and 1944, credit to that all of the bonds purchased in those years in the name of Mr. Ormont and Mrs. Goldberg?

A. No, sir; I did not.

Q. Which ones did you credit? [840]

A. Only amounts which were paid for from funds from unexplained sources.

Mr. Robnett: I move to strike the answer out, if the court please, as calling for a conclusion of the witness, as to which bonds they were and the way he identifies them as to how they were paid. There is no identification of the bonds at all. It is

(Testimony of J. Bryant Eustice.)

his conclusion as to whether they were paid for or how.

The Court: That is correct. It is a conclusion. I think by this time, however, the jury understand that when the witness say "unexplained sources" that that is the witness' opinion and that their function is to determine ultimately, in the event the case goes to them, whether or not it is unexplained.

Mr. Robnett: If the court please, what was the ruling?

The Court: I think that I will deny the motion, but I have instructed the jury that it is merely an expression of opinion of an expert, and that this witness here is on the witness stand as an expert and his testimony is opinion testimony. In other words, it is what he contends is unexplained, and I say I think the jury understands by this time that they are to regard his testimony in that fashion rather than as a positive and absolute fact.

Q. (By Mr. Strong): In discussing the amount of money which was credited on the books of the firm of Merrill, Lynch, Pierce, Fenner & [841] Beane, which you testified that you took in as part of the unreported income for the year 1943, did you ascertain whether that money was or was not available to the taxpayer during that year, to Mr. Ormont?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial, and it would be hearsay testimony of the witness and is therefore incompe-

(Testimony of J. Bryant Eustice.)

tent, irrelevant and immaterial and would be an opinion of the witness.

Mr. Strong: It was gone into on cross-examination.

The Court: It is not redirect because you went into that on direct. He testified on direct as to that.

Mr. Strong: But they also asked additional questions on cross. I want to clear up certain phases that were brought out on cross-examination, your Honor. I don't want to go over the direct.

The Court: I understand. Let me hear the question again.

(The question referred to was read by the reporter, as follows:

("Q. In discussing the amount of money which was credited on the books of the firm of Merrill, Lynch, Pierce, Fenner & Beane, which you testified that you took in as part of the unreported income for the year 1943, did you ascertain whether that money was or was not available to the taxpayer during that year, to Mr. Ormont?") [842]

The Court: The objection to that is sustained. He can testify as to what he did about it.

Q. (By Mr. Strong): Will you testify to what you did in that respect?

Mr. Robnett: I object to that, if the court please, as incompetent, irrelevant and immaterial. It wouldn't be bidding upon the defendant Ormont as to what he did in that connection unless it is shown

(Testimony of J. Bryant Eustice.)

that Ormont was with him or that he reported it to Mr. Ormont. It is a situation of merely a debtor and creditor crediting on the books that I owe something only makes me the debtor, that is all. I don't think that the evidence of what this witness did as to find out whether the debtor could or could not pay is immaterial. It is hearsay.

The Court: I think you are right.

Mr. Strong: It is material in determining why it was added to the unreported income.

The Court: It is still hearsay. Objection sustained.

Q. (By Mr. Strong): Now with reference to Defendants' Exhibit Y, which is a group of checks, eight \$100 checks, issued in November and December of 1942 and January of 1943, payable to Sam Ormont or S. Ormont, and issued by the Acme Meat Company, signed S. Ormont, concerning this exhibit and these checks you were asked as to whether they were or were not used to pay [843] for the \$7000 worth of bonds purchased at about that time. Do you know of your own knowledge whether or not those checks were used to pay for those bonds?

A. No, sir; I do not.

Q. And in your examination of the records of the Acme Meat Company, were those checks shown as being used to pay for bonds?

Mr. Robnett: I object to that, if the court please, as asking for an opinion of the witness and hearsay testimony as to what the books show, and the books are the best evidence as to what they show.

(Testimony of J. Bryant Eustice.)

The Court: Objection overruled.

The Witness: No, sir, they do not.

Q. (By Mr. Strong): Now showing you Defendant's Exhibit X, which is a check for \$204.75, issued by the United Dressed Beef Company, payable to Sam Ormont, dated December 11, 1942, do you know whether this check was used in payment of any bonds purchased by Sam Ormont on or about that time? A. No, sir, I do not.

Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?

Mr. Robnett: I object to that on the ground that the books would be the best evidence, and it is incompetent, irrelevant [844] and immaterial, calling for a conclusion of the witness, and nothing to show that it even went to the Acme Meat Company or that they had anything to do with it.

The Court: Let me see the exhibit.

(The document referred to was passed to the court.)

The Court: Your question is what?

(The question referred to was read by the reporter, as follows:

("Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?")

The Court: The objection is not timely, counsel. You cross-examined the witness at length upon the

(Testimony of J. Bryant Eustice.)

records, books, documents and data of the Acme Meat Company and counsel now by that examination I think you have waived any right to the objection which you have made. The objection is overruled.

The Witness: The answer is no.

Q. (By Mr. Strong): Now showing you defendant's Exhibit V, which is a check dated January 8, 1943, in the sum of \$5000, paid to the order of Sam Ormont, signed Sam Ormont—it is an Acme Meat Company check—do you know whether this check was used to pay for any of the bonds purchased by the defendant Sam Ormont?

A. I do not know that it was; no, sir. [845]

Q. And again as to the books and records of the Acme Meat Company which you examined, did they show what that check was used for?

A. No, sir. It just indicates that it was money drawn by S. Ormont.

Q. And showing you this document, which is Defendant's Exhibit O, a check dated 5/11/1942, issued by the Acme Meat Company for \$206.11, signed by Sam Ormont, paid to Sam Ormont, do you know whether this check was used to pay for any bonds purchased by the defendant Sam Ormont during or at about that period?

A. No, sir; I do not.

Q. As to the books of the Acme Meat Company, do they show that it was used in that way?

A. No, sir.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial.

The Court: As to his examination of them, you mean?

Mr. Strong: As to his examination of them.

Mr. Robnett: It is a conclusion of the witness and the books would be the best evidence. I never asked him, only from his notes as to what his notes showed as to certain things, your Honor. I don't believe it is proper for him to ask what the books show.

The Court: Counsel amended his question to say what his [846] examination of the books showed.

Mr. Strong: That is what I meant all the time.

The Court: That is what you meant all the time?

Mr. Strong: Yes.

The Court: Whether or not he found them?

Mr. Strong: Yes, he of his own knowledge.

The Court: The objection is overruled.

Q. (By Mr. Strong): Do we have an answer?

A. No, sir.

The Court: The motion to strike will be denied.

Q. (By Mr. Strong): Now I show you Government's Exhibit S, which is a check of the Acme Meat Company dated 4/26, 1943, in the sum of \$1332.27, payable to the order of S. Ormont, signed Acme Meat Company by Sam Ormont, and I ask you whether of your own knowledge you know whether this check was used to purchase any bonds by Sam Ormont or in the name of Sam Ormont.

A. No, sir; I do not.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Same objection.

The Court: Same ruling.

Q. (By Mr. Strong): Here is another check, Defendant's [847] Exhibit AA, paid to Sam Ormont, \$100, dated 1/22/43, signed Acme Meat Company by Sam Ormont; and attached to it is a check dated 1/29/43, \$100, paid to S. Ormont, signed Acme Meat Company by Sam Ormont. Do you know whether or not those checks were used to purchase any bonds in the name of Sam Ormont?

A. No, sir; I do not know.

Q. And so far as your knowledge of the books and records of the Acme Meat Company, do they show that that was used for that purpose?

A. No, sir; they do not.

Q. Here is a check for \$595.25, paid to Sam Ormont, signed Sam Ormont, Defendant's Exhibit Z. Do you know whether this check was used to purchase bonds in the name of Sam Ormont?

A. No, sir; I do not.

Q. Here is a check dated 4/3/43, it is Defendant's Exhibit CC, and it is for \$249.26, signed Sam Ormont, payable to the Treasury of the United States. Do you know whether this check was used to purchase bonds or pay for bonds purchased by Sam Ormont?

A. No, sir; I do not.

Q. I show you Defendant's Exhibit E, which is a check paid to the order of Sam Ormont, dated 12/20/44, in the sum of \$3682.00, signed Acme Meat Company by Sam Ormont. Will [848] you state whether you know whether this check was used to

(Testimony of J. Bryant Eustice.)

pay for bonds purchased in the name of Sam Ormont? A. No, sir; I do not.

Q. Do you of your own knowledge know what that check was used for?

The Court: Of your own knowledge?

The Witness: Yes, sir.

The Court: You do?

The Witness: Yes, I know what this check was used for.

The Court: Of your own knowledge?

The Witness: I don't know how broad that is, your Honor.

The Court: I mean, your own knowledge, you would pretty nearly have to be there when the money is spent.

The Witness: Well, to that extent, no, your Honor, I do not know.

Q. (By Mr. Strong): You do know from the books and records of the Acme Meat Company?

Mr. Robnett: I will object to that, if the court please.

Mr. Strong: I will withdraw the question.

Q. I show you Defendant's Exhibit T, which is a series of checks signed by Sam Ormont, the first one is dated 2/20/43 for \$494, Hachten and Robinson Livestock Com. Co., signed by Sam Ormont; the second check is dated 4/21/43 for \$26.40, Sam Ormont, Californida Livestock Com. Co., the next one is dated [849] 4/21/43 for \$157.70, Sam Ormont to another concern; another check dated 4/21/43 for \$55.20, payable to Holmes Livestock Com. Co.,

(Testimony of J. Bryant Eustice.)

signed Sam Ormont; another check dated 4/21/43 for \$77.10, signed by Sam Ormont, payable to some concern as shown on the face of the check; another check dated 4/21/43, payable to D. H. Lillywhite, for \$249.30, signed by Sam Ormont; another check dated 4/22/43, \$35.40, payable to Gallagher Livestock Com. Co., signed by Sam Ormont; a check dated 4/22/43, \$64.35, payable to another concern shown on its face and signed by Sam Ormont; another check dated 4/22/43 for \$82.82, payable to Producers Livestock Marketing Association, signed by Sam Ormont; another check dated 4/22/43, \$89.10, payable to Southwest Commission Company, signed by Sam Ormont—I ask you whether from your examination of the books and records of the Acme Meat Company you know what those checks were issued for.

Mr. Robnett: I object to that on the ground it would be asking for hearsay testimony and is incompetent, irrelevant and immaterial. He is basing it now upon the books that are not in evidence and they would be the best evidence. He is necessarily asking for his opinion and conclusion.

The Court: His question was, from your examination of the books and records, is that right?

Mr. Strong: Yes.

The Court: Let me hear it.

(The question referred to was read by the reporter as set forth above.)

The Court: The objection is overruled.

The Witness: No, sir; I do not.

(Testimony of J. Bryant Eustice.)

The Court: Those are personal checks of Sam Ormont out of his personal bank account?

The Witness: Yes, they are, your Honor.

Q. (By Mr. Strong): Do you have any knowledge at all as to what those checks were issued for?

Mr. Robnett: I object to that on the ground it is asking for hearsay. The witness couldn't have any knowledge of his own.

The Court: I don't know. Maybe he was there.

Mr. Robnett: May I ask that he be instructed to answer yes or no? [850]

Mr. Strong: That is all he has been answering, yes or no.

Q. What was the answer? A. No.

Q. Now that was Defendant's Exhibit T, is that right? A. Yes, sir.

Q. Here is a check, Defendant's Exhibit V, which is drawn by Sam Ormont, dated September 30, 1944, payable to Roy Miller & Son for \$1932, showing that it was paid on January 9, 1943. Do you know what this check was issued for?

Mr. Robnett: I object to that on the ground it is immaterial, whether he does know or doesn't know.

The Court: The objection is overruled.

As a matter of fact, you don't know of your own knowledge what any of those checks were used for, do you?

The Witness: That is right, your Honor.

Mr. Robnett: As to that last check, I also want

(Testimony of J. Bryant Eustice.)

to interpose the further objection that it is not redirect. I did not cross-examine him on that.

Mr. Strong: These are all defense exhibits, your Honor.

Mr. Robnett: That doesn't make any difference. I didn't cross-examine this witness on that.

The Court: This is redirect. He has answered no.

Mr. Robnett: Even so, your Honor, we probably can save time. I am willing to stipulate—— [851]

The Court: I just asked him, as a matter of fact you don't know what any of the checks were actually issued for, and he said no.

Mr. Strong: Is that a stipulation?

Mr. Robnett: I will stipulate that this witness doesn't know anything about what any of the checks were used for or what money or what funds were used to purchase any of the bonds or what bonds the defendant Sam Ormont over purchased.

Q. (By Mr. Strong): Do you know from your examination of the books and records of the Acme Meat Company whether any of the checks, which are defendant's Exhibits B, C, D, P and R, do you know from that examination what they were used for?

Mr. Robnett: I object to that as having been asked and answered.

Mr. Strong: This is from the books, whether the books show it, your Honor.

The Court: Whether or not he found them?

Mr. Strong: Yes.

(Testimony of J. Bryant Eustice.)

The Court: Did you find anything in the books to show what they were used for? (Incidentally, your objection is overruled.)

Q. (By Mr. Strong): In other words, you found nothing——

The Court: Wait until he answers my question.

Mr. Strong: I thought you overruled it because he answered it.

The Court: No, he hasn't answered yet.

Did you find anything in the books indicating what those checks were actually used for?

The Witness: No, your Honor, I did not.

The Court: All right.

Q. (By Mr. Strong): Now as to these defendant's exhibits which I have questioned you about, all of these checks, Defendant's Exhibits B, C——

The Court: Why repeat them? You just got through mentioning them.

Q. (By Mr. Strong): Do the books and records, from your examination of them, of the Acme Meat Company, show anything as to those checks at all?

A. (Examining documents)

Mr. Strong: I have some more checks that I overlooked, DD. May I include those as part of the question?

Mr. Robnett: Yes, include them all.

The Witness: Certain of these checks are not recorded on the books and records of the Acme Meat Company and are not drawn on that bank account.

Mr. Robnett: I move to strike that out as a

(Testimony of J. Bryant Eustice.)

conclusion [853] of the witness. That statement is not responsive to the question.

The Court: The question is whether or not you found anything in the books and records. Not whether they actually are or aren't. Did you or didn't you find it?

The Witness: On some of these checks, your Honor, yes.

The Court: Some of them you found some record of?

The Witness: I would have to divide which are on the books and records of the Acme Meat Company and which are drawn on the defendant's personal bank account.

The Court: Obviously a check of the Acme Meat Company would be in the books and records, wouldn't it?

The Witness: Yes, your Honor.

Mr. Strong: It may.

The Court: It would have to be a check and it is a part of the records.

Q. (By Mr. Strong): Which are the ones which were on the records of the Acme Meat Company?

The Court: You mean which he found?

Mr. Strong: Yes. I always mean which he found because we don't have the record.

The Witness: Exhibits AA, DD, Y and B are on the books and records. There are two others that are on the books and records, E and Q, and also S.

Q. (By Mr. Strong): As to these exhibits which you just testified you found on the books and records

(Testimony of J. Bryant Eustice.)

of the Acme Meat Company, will you state as to each one whether or not those books and records, as you found them, showed what those checks were for?

A. Yes, sir.

Q. Take them one by one and state what you found.

A. Exhibit AA, these checks are charged to Mr. Ormont's drawing account——

Mr. Robnett: I move to strike the answer as not responsive, if the Court please. He was asked if it showed what they were for. Merely charging them to something doesn't show what they were for.

Mr. Strong: I said to state what he found.

The Court: Read the question.

(The question referred to was read by the reporter as set forth above.)

The Court: Upon the books and records?

Mr. Strong: Yes. That is the preceding question.

The Court: Objection overruled.

The Witness: Exhibit AA——

Q. (By Mr. Strong): Is that the first one you are talking about? A. Yes, sir. [855]

Q. Go ahead.

A. Is charged to the drawing account of Mr. Ormont.

Q. That exhibit consists of two checks of \$100 apiece? A. Yes, sir.

Q. And in computing the sum which you claim was the unreported income for the year 1943 did you include these two checks?

A. No, sir; I did not.

(Testimony of J. Bryant Eustice.)

Q. Take the next one, please.

A. Exhibit DD, these checks were charged to Mr. Ormont's drawing account.

Q. Again asking you the same question as to whether in computing the unreported income which you claim there was, did you include in that these checks? A. No, sir; I did not.

Q. The next one.

A. Exhibit V is a check charged to Mr. Ormont's capital account, I believe; capital or drawing.

Q. That is the \$5000 check? A. Yes, sir.

Q. Did you include that as part of your computation of the unreported income for that year?

A. No, sir; I did not.

Q. The next one. [856]

A. Exhibit Y are checks charged to Mr. Ormont's drawing account.

Q. Did you include those in your computation of the unreported income for that year?

A. No, sir; I did not.

Exhibit E is a check drawn to reimburse Mr. Ormont for the cost of merchandise for the Acme Meat Company. That is a check in the sum of \$3682?

A. That is correct.

Q. Did you in computing the unreported income for that year include this sum as part of the unreported income? A. No, sir; I did not.

Q. The next one.

A. Exhibit S is another check which I believe was used for the same purpose.

(Testimony of J. Bryant Eustice.)

Q. This is a check for \$1332.27, is that right?

A. Yes, sir.

Q. Did you include that as part of the amount you claim was unreported income for that year?

A. No, sir; I did not.

Q. Have you any more?

A. Exhibit O is a check drawn by the Acme Meat Company for \$206.11. I don't recall whether that was charged to the drawing account or reimbursement for expenses.

Q. But did you include that check for \$206.11 as part [857] of the sum which you assert was unreported income for that year?

A. No, sir; I did not.

Q. I show you Defendant's Exhibit X, which is a check for \$204.75 payable to Sam Ormont and ask you whether you reported that as part of the unreported income of Sam Ormont for that year?

A. (Examining document)

Mr. Strong: Is this a good time for a recess?

The Court: We will have a short recess. Remember the admonition.

(Short recess.) [858]

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

The Court: Let me see Exhibit S, the check for \$1300 and some odd dollars. Mr. Eustice, I understood you to say a moment ago that from your examination of the books and records of the Acme Meat

(Testimony of J. Bryant Eustice.)

Company you did determine that this was a repayment to Sam Ormont for merchandise, or did I misunderstand you?

The Witness: I don't know whether——

The Court: Just before recess.

The Witness: I know it came out in the calculations here the other day. I believe that was what it was used for. I may have made a mistake.

The Court: Because in your testimony, on page 603, Mr. Robnett asked you whether or not you determined that that was in repayment to Sam Ormont for the check, Exhibit T. You said no, I didn't determine that. I got the impression from your testimony on cross-examination that you had not learned from your examination that that was a repayment to Ormont for money advanced in the business.

The Witness: I think I learned it here.

The Court: Oh, you learned it here?

The Witness: Yes.

The Court: Very well. [859]

Q. (By Mr. Strong): But whatever Exhibit S was for, do I understand that you did not take it into computing the income that you claim was unreported income for that year?

A. No, sir, I did not take it into income.

Q. Will you examine these other checks which you testified to?

A. Exhibit X I did not take this in as additional income either—the amount of this check.

(Testimony of J. Bryant Eustice.)

The Court: That is X?

Mr. Strong: Yes, a check for \$204.75.

The Witness: Do you wish to take each one of these separately?

Q. (By Mr. Strong): Did you, as to each of the checks which you now have in your hands, take any of the sums in——

The Court: You had better identify these, because these checks have not been identified for the record.

Q. (By Mr. Strong): Taking Defendant's Exhibit B, that's for \$1932; C, \$1300; D, \$450; P, \$206.11; R, a check for \$814.73; T, a group of checks in varying amounts; Z, a check for \$595.25, and CC, a check for \$249.26. Did you take in any one of those checks in computing the additional income which you claim was unreported? [860]

A. No, sir, I did not take the amounts of those checks in as additional income.

Q. I show you Defendant's Exhibit G, which is a sheet of paper, with various entries upon it. I will ask you whether you ever saw that before this trial?

A. No, sir, I did not.

Q. And do you know of your own knowledge, or from what you found on examining the books, whether any of the entries and the items and the figures shown on Defendant's Exhibit G are reflected in the same way on the books of the Acme Meat Company?

A. No, sir, I do not.

Q. I show you Defendant's Exhibit H, and ask

(Testimony of J. Bryant Eustice.)

you whether you ever saw this document before this trial; just that document itself.

A. No, sir, I did not.

Q. Do you know of your own knowledge, or from your examination of the books and records of the Acme Meat Company whether any of the figures on Defendant's Exhibit H correctly reflect the entries in the books and records of the Acme Meat Company?

A. No, I do not. I did not make a comparison.

Q. I show you Defendant's Exhibit U, which is a sheet of paper with some figures which you wrote down upon the dictation of counsel for the defendant, totaling the sum of [861] \$3332.27, and ask you whether you took in any part of those sums and those figures in your computation of the unreported income of the defendant Sam Ormont, for that year?

A. No, sir, I did not.

Q. And I show you Defendant's Exhibit F, which is a sheet of paper with some figures which you wrote down on cross-examination, totaling \$3682, and ask you whether, in computing the sum which you claim was the unreported income for the defendant Sam Ormont for that year—whether you took into consideration any part of that sum of those figures shown on that sheet?

Mr. Robnett: What Exhibit?

Mr. Strong: F.

A. I did not take any of this amount into income, no, sir.

Q. I show you Defendant's Exhibit Q, which is

(Testimony of J. Bryant Eustice.)

an application for a bond, and the signature appears to be that of Dora Goldberg. Will you state whether you know of your own knowledge, or whether you know of your examination of the books and records of the Acme Meat Company, or the defendant Sam Ormont, whose money was used to pay for that bond?

A. I don't know whether we identified that.

The Court: There are two questions here. The first one is whether or not you know of your own knowledge whose money it was. [862]

The Witness: I would not know.

The Court: The next is whether you found anything from your examination of the books and records.

The Witness: No, I did not find anything in the books and records regarding the purchase of this bond.

Mr. Strong: May I have the answer read?

(Answer read by the reporter.)

Q. By the way, I understand, the only books and records that you examined were of the Acme Meat Company?

A. That is correct; and I had the cancelled checks, personal checks of the defendant.

Q. Did you examine any personal records of the defendant, Sam Ormont?

A. No, sir, I did not.

Q. Were there any such records, so far as you know?

(Testimony of J. Bryant Eustice.)

Mr. Robnett: I object to that as irrelevant and immaterial, and not redirect.

The Court: Overruled.

A. Not as far as I know, no, sir.

Q. (By Mr. Strong): Did you discuss with the defendant, Sam Ormont, whether there were any such personal records?

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial; not redirect examination; not binding upon the defendant; and no proper foundation has been laid. [863]

The Court: No foundation.

Mr. Strong: At any time then. We will get the time.

Mr. Robnett: It is asking for an answer on a question of fact.

The Court: He is asking for the substance of the conversation.

Mr. Robnett: Certainly.

The Court: Objection sustained.

Q. (By Mr. Strong): Did you, at any time have a discussion with the defendant, Sam Ormont, as to whether he has or has not personal books and records?

Mr. Robnett: I object to that on the ground that no foundation has been laid; that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Yes, sir, I did.

Q. (By Mr. Strong): When was that?

(Testimony of J. Bryant Eustice.)

A. I believe that was in our discussion of November 27, 1945.

Q. That's one you testified to before?

A. Yes, sir.

Q. And you identified before who was present?

A. Yes, I did. [864]

Q. What did Mr. Ormont say?

Mr. Robnett: Objected to upon the ground that it is not redirect, if the Court please. They went into these matters on their direct examination.

The Court: Yes, but on your cross examination you cross-examined the witness about whether or not Sam Ormont said so and so to him at such and such a time.

Mr. Robnett: Not at all about records, your Honor. This is going in, and putting in the conversation about records. He was not asked that. I did not ask a thing in the world on anything of that sort. I was really crossing him on their direct examination.

The Court: As to what Sam Ormont told him about certain things; it is not redirect. Objection sustained.

Mr. Strong: Can I make it a part of the redirect, as a question I forgot to ask about that on direct? That is within your Honor's discretion.

The Court: Do you mean you want to reopen the direct examination?

Mr. Strong: As to this one question. That is discretionary with your Honor.

The Court: Yes, it is. I will permit a reopening

(Testimony of J. Bryant Eustice.)

of the direct examination, and the defendant may cross-examine on it.

Mr. Robnett: Now, I object to it, if the Court please, upon the ground that no proper foundation has been laid showing [865] whether or not this witness, before talking to Mr. Ormont on the subject, advised the defendant who he was, what official position he had, what he was doing, and whether anything that was said could be used against Mr. Ormont in a future prosecution, or anything of the sort. It is in the nature of a confession, if anything, and is not admissible without first having advised the defendant of his constitutional rights.

The Court: I think the whole thing is immaterial.

Mr. Strong: I think it will become material as we go along. Certainly it is not a confession.

Mr. Robnett: It is improper to open it up at this time, then.

The Court: I think that is correct; counsel did not urge his objections before when you asked this witness concerning conversations with the defendant Sam Ormont. His objection is good upon the ground of no foundation.

Q. (By Mr. Strong): Did you, prior to the conversation on that occasion that you have just testified to, tell Mr. Ormont who you were?

A. Yes, I had properly identified myself.

The Court: The word "properly" may be stricken, and the jury instructed to disregard it.

Q. (By Mr. Strong): State what you told him in that respect.

(Testimony of J. Bryant Eustice.)

A. I had previously been introduced to Mr. Ormont and [866] shown him my commission.

Mr. Strong: I repeat the question, your Honor.

The Court: What is the question?

Mr. Strong: The question was as to the conversation.

The Court: You had better reframe the question.

Q. (By Mr. Strong): During the conversation did Mr. Ormont and you discuss his having or not having personal books and records?

Mr. Robnett: I object to that. No foundation, proper foundation, has been laid, if the Court please, and the same ground; incompetent, irrelevant and immaterial, and not redirect. It is improper to open up the case in that manner, as it involves the constitutional rights of the defendant.

Mr. Strong: The whole case involves them.

The Court: I was under the impression that counsel's cross-examination of this witness concerned the conversations with Ormont.

Mr. Strong: I thought so, your Honor.

Mr. Robnett: No, your Honor.

The Court: It is a pretty broad scope.

Mr. Robnett: There were only two or three things I asked him about, which had been asked on direct examination. He had voluntarily stated that the defendant had said such and such a thing, and I asked him about those. I went into no conversations. The prosecution did not at any time ask about [867] conversations. He did not go into any

(Testimony of J. Bryant Eustice.)

except on one occasion, that the defendant did not tell him he had other funds.

Mr. Strong: Your Honor, it is discretionary. I want him to give the full conversation.

The Court: I have permitted you to reopen the subject but counsel has urged the objection, which is sustained.

Q. (By Mr. Strong): I show you Defendant's Exhibit W, which is an application for \$7,000 worth of \$1,000 bonds. It is seven \$1,000 bonds, to be described in the name of Mr. Samuel Ormont or Mrs. Dora Goldberg, and bearing the signature of the purchaser as Samuel Ormont. Did you, from your own knowledge, or from the examination of the books and records of the Acme Meat Company know as to whose money was used to pay for those bonds?

Mr. Robnett: I object to that as a compound question, if the Court please.

The Court: It is compound. I think you had better split up your question.

Q. (By Mr. Strong): Do you know of your own knowledge whose money was used to pay for those bonds—of your own knowledge?

A. No, sir, I do not.

Q. Do you know, from knowledge you gained from your examination of the books and records of the Acme Meat Company, as to whose money was used to purchase those bonds? [868]

Mr. Robnett: Objected to upon the ground that it calls for a conclusion.

(Testimony of J. Bryant Eustice.)

The Court: It calls for a conclusion. He can testify to what he found from the books and records.

Q. (By Mr. Strong): Did you find anything that would indicate whose money was used to pay for those bonds?

A. No, sir, not of my own knowledge.

Q. Going back to Exhibit Q, which deals with one \$500 bond, in computing the amount which you claim as unreported income of the defendant Sam Ormont for that year, did you include that bond?

Mr. Robnett: I submit that is not redirect examination. He was asked about these matters on direct examination, and it was only cross-examination afterward.

Mr. Strong: The bonds were split up, and gone into extensively on cross-examination. I don't remember asking about them individually.

Mr. Robnett: That's how he had determined unreported income, because he could not find money with which to purchase those bonds on the list he had.

Mr. Strong: I don't think that is the question. You went into it bond by bond.

The Court: What is the specific question on Q?

Mr. Strong: Whether that bond was included as part of the [869] sum which the witness says was the unreported income of Ormont for that year.

The Court: What is this, one \$500 bond?

Mr. Strong: That is what it seems to say.

The Court: Objection overruled.

(Testimony of J. Bryant Eustice.)

A. No, sir, I don't find where I have taken this into account as income.

The Court: As additional income?

The Witness: As additional income.

Q. (By Mr. Strong): Now, I show you Defendant's Exhibit W, dealing with the seven \$1,000 bonds purchase, the name on the application being Sam Ormont, and ask you whether you took those bonds into account as part of the additional income, unreported income, from the defendant Sam Ormont?

A. I took \$2,000, of the purchase price of those bonds in as additional income.

Q. That is what you testified to on cross-examination in detail? A. Yes, sir.

Q. I now show you Defendant's Exhibit BB, and ask you whether you know of your own knowledge whose money was used to purchase the bond represented on this application?

A. No, sir, not of my own knowledge.

Q. Did you find anything on the books and records of the [870] Acme Meat Company which would indicate whose money was used to purchase it? A. No, sir, I did not.

Q. Did you take that bond, for the sum of \$1,000, into account as part of the sum you assert is in the unreported income of the defendant Sam Ormont?

A. These applications, I might say, don't indicate the bond number, so that I can definitely identify the bond. I believe we came to a conclusion as to the possible bonds that were purchased.

(Testimony of J. Bryant Eustice.)

Q. I want to know specifically whether you took that particular bond, shown by that application, which is Defendant's Exhibit BB?

A. I don't know definitely, no, sir.

Q. Now, I show you Defendant's Exhibit FF, the income tax return for the year 1944, with the name Dora Goldberg. Do you know whether Dora Goldberg had any income during that year of \$817.42, as shown on that return?

A. No, sir, I do not.

Q. From your examination of the books and records of the Acme Meat Company, did you find anything which would show whether she had such an income? A. No, sir, I did not.

Q. And there is shown on this same return, Defendant's Exhibit FF, the sum of \$53, tax. Do you know of your own [871] knowledge whose money was used to pay that tax?

A. No, sir, I do not.

Q. On your examination of the books and records of the Acme Meat Company, did they reveal whose money was used to pay that tax?

A. No, sir.

Q. You testified as to discussions with the defendant Sam Ormont in connection with your investigation into his income tax for the years 1942, 1943 and 1944; and I show you Government's Exhibit 6, which gives the return, the fiscal year return, which shows it was received on May 24, 1945 in the Collector's office. I ask you whether all of your discussions and your examinations of the books

(Testimony of J. Bryant Eustice.)

and records with reference to your investigation into the income tax and the income of the defendant Sam Ormont for those years was completed before May 24, 1945?

Mr. Robnett: I object to that, if the Court please, upon the ground that it is compound, in the first instance, and asks him all of his discussions and all of the examinations of his books.

Mr. Strong: I am getting the last date, your Honor.

Mr. Robnett: I object upon the further ground that it assumes something not in evidence, namely, that he had a number of discussions. There isn't any evidence that he had a number of discussions. There is evidence that at one time he spoke [872] to the defendant, he said, and talked with him. That was in November, 1945, the 17th of November.

The Court: I think the question is a little indefinite, because the fact is the witness has not yet concluded his investigation concerning Sam Ormont for those years. He is still on the witness stand about it.

Mr. Strong: He is testifying to what has passed.

The Court: I think your question could be made a little more definite and certain. Otherwise the objections will be overruled.

Mr. Strong: The objection is overruled? Can he answer?

The Court: I say otherwise he can answer.

Q. (By Mr. Strong): When was the last time that you examined the books and records of the

(Testimony of J. Bryant Eustice.)

Acme Meat Company in connection with this investigation?

A. It must have been, as near as I know, about March of 1946.

Q. What was the last conversation——

The Witness: February or March. Excuse me.

Q. ——if you had more than one, when was the last conversation you had with the defendant Ormont regarding his income for the years 1942, 1943 and 1944?

Mr. Robnett: That is assuming something not in evidence, namely, that he had more than one conversation, or had any [873] conversation concerning Mr. Ormont's income. There is no testimony on that at all. It is incompetent, irrelevant and immaterial, and not redirect.

The Court: I don't know where it is material.

Mr. Strong: To explain that would go into the Government's case.

The Court: When you finished your regular investigation you filed a report, did you?

The Witness: Yes, your Honor.

The Court: After that you were through with the investigation?

The Witness: Yes, your Honor, after I filed my report I was through.

The Court: Your investigation was finished?

The Witness: Yes.

The Court: What was the date of your report?

The Witness: March 18, 1946.

The Court: Isn't that what you want to know?

(Testimony of J. Bryant Eustice.)

Mr. Strong: I want the last time you talked to him.

The Court: March 18, 1946.

Mr. Strong: That is the date of his report.

Q. When was the last time you talked with Sam Ormont in connection with the investigation?

The Court: But you are directing your question in relation to the filing of the return. [874]

Mr. Strong: Yes, in relation to the return which was filed March 25 or 24, 1945, which is Government's Exhibit 6.

The Witness: This isn't May 24, 1945.

Mr. Robnett: May I have that answer? That isn't an answer to his question.

Mr. Strong: Let us withdraw it, your Honor. We will save time.

Mr. Robnett: I move that it be stricken then.

Mr. Strong: There was no answer.

The Court: He was just asking the witness the date that appears upon Exhibit 6, the filing date.

Mr. Robnett: Thank you.

Q. (By Mr. Strong): Mr. Eustice, you were asked some questions on cross examination with reference to the comparative statement of net worth for the year 1943, specifically with reference to an item shown on it of \$6525.58, which was composed of payment of life insurance premiums, payment on 1942 income tax, other taxes paid, personal expenses paid by check, and personal expenses paid by cash, which was gone into in detail on cross-examination as to that item of \$6525.58. In computing the amount of income which you claim was

(Testimony of J. Bryant Eustice.)

unreported by the defendant Sam Ormont, did you take into account that sum of \$6525.58?

The Court: What do you mean did he take it into account? [875]

Mr. Strong: Did he include it as part of the additional unreported income?

The Court: That is different.

The Witness: No, sir, I did not make my computation from the net worth statement.

The Court: By the way, counsel prepared and handed around to myself and other counsel these two documents.

Mr. Strong: I would like to offer them in evidence.

The Court: I was thinking they should be marked for identification.

Mr. Strong: I thought they were.

The Court: Were the originals marked for identification?

The Clerk: No, they are not.

The Court: They should be marked for identification at least. One is your original calculation of additional income.

The Witness: I haven't any of them. Counsel took them away from me some days ago.

The Court: Mr. Strong will supply a copy, and they will be marked for identification 46 and 47.

The Clerk: The confidential report of Sam Ormont will be 46.

(The document referred to was marked Government's Exhibit 46 for identification.)

(Testimony of J. Bryant Eustice.)

Mr. Strong: That is called a comparative statement of net worth. [876]

The Court: Yes.

Mr. Robnett: It is only for identification?

The Court: It is only for identification.

Mr. Strong: I offer in evidence 46.

Mr. Robnett: I object to that as a self serving declaration, if the Court please, of the witness; incompetent, irrelevant and immaterial. All of the items thereon have not been explained. It is merely a self serving declaration.

The Court: I will reserve my ruling on the admission of this document.

Mr. Strong: I would also like to offer in evidence the other document, which I believe is 47. That is also a summary of the witness' testimony.

(The document referred to was marked Government's Exhibit 47 for identification.)

The Court: That is a statement of additional income?

Mr. Strong: Yes.

The Court: The statement of net worth is 46, and the calculation of each year, of which you have a copy, will be 47.

Mr. Robnett: I object to that on the same ground.

The Court: I will reserve my ruling on each of the documents.

Mr. Strong: In that connection I would just like to refer your Honor to one case.

(Testimony of J. Bryant Eustice.)

The Court: I am familiar with it. [877]

Mr. Strong: All right.

The Court: That is in a different circuit.

Mr. Strong: The United States Circuit Court of Appeal.

The Court: I know, but it is in the Second Circuit.

Q. (By Mr. Strong): I will show you Government's Exhibit 42 for identification, and ask you whether this list of bonds was the source of the information which you had as to the matters which are shown on the face of that document?

The Court: What exhibit is that?

Mr. Strong: 42. That is the list of bonds.

The Court: What is the question?

(Question read by the reporter.)

The Court: I don't understand that.

Mr. Strong: I want to know whether he got his information from that list; then I will offer to show where that list came from later. I am just tracing it, your Honor. He testified as to the bonds, and what he did with them.

Mr. Robnett: I object to that upon the ground that it is incompetent, irrelevant and immaterial, hearsay testimony, and it never was gone into on cross examination, and would not be redirect examination of the witness on any subject whatsoever. It is opening up a new subject. The witness in his cross-examination referred to Exhibit 40.

Mr. Strong: The witness himself testified as to

(Testimony of J. Bryant Eustice.)

who he [878] got that list from. That was gone into on cross-examination.

Mr. Robnett: It would be seeking hearsay testimony.

Mr. Strong: I am not seeking hearsay testimony.

The Court: Objection overruled.

A. There was another step in there. Can I explain it?

Mr. Robnett: Answer yes or no.

Mr. Strong: Just answer yes or no.

The Court: You will have to answer that question yes or no.

The Witness: May I have the question?

The Court: Is that where you got your information concerning Sam Ormon't bonds?

The Witness: This was the source.

Mr. Strong: That is all I want to know.

The Court: Recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, Thursday, June 5, 1947, a recess was taken until 2:00 o'clock p.m.) [879]

Los Angeles, California, June 5, 1947,
2:00 o'Clock P.M.

The Court: Ex parte?

The Clerk: Yes, your Honor.

(Other court matters.)

The Court: United States v. Ormont and Himelfarb. Call the jury down.

(The jury returned to the courtroom at 2:05 o'clock p.m.)

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: Yes, your Honor.

Mr. Katz: So stipulated.

The Court: Proceed.

J. BRYANT EUSTICE

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Strong: I think there was an unanswered question, your Honor, if I am not mistaken.

The Court: The reporter does not have the transcript.

Do you remember, Mr. Eustice, what exhibit you were looking at just before the recess?

The Witness: No, I don't.

Mr. Strong: I will ask another question, your Honor.

The Court: Very well. [883]

Redirect Examination

(Continued)

By Mr. Strong:

Q. Mr. Eustice, there were some questions directed to you on cross-examination with reference to a bond which was issued in the name of Sam Ormont and Sue Kosdon. Do you recall that?

A. Yes, sir; I do.

(Testimony of J. Bryant Eustice.)

Q. Now I ask you whether in your computation of the sum which you assert is unreported income for that year, whether you took in as part of that unreported income the bond issued to Sam Ormont and Sue Kosdon. A. No, sir; I did not.

Q. No part of it? A. No part of it.

Q. Showing you Defendant's Exhibit EE, which is the income tax return of Sam Ormont for the year 1945, a question was directed to you on cross-examination with reference to the sum of \$19,254.76. I ask you whether you took in as part of the unreported income for the year 1944 of Sam Ormont, whether you included as part of that income any sum of \$19,254.76 appearing on Exhibit EE.

A. No, sir; I did not.

Mr. Strong: No further questions.

The Court: Recross?

Mr. Robnett: Just a few questions, your Honor.

Recross-Examination

By Mr. Robnett:

Q. Mr. Eustice, I am going to put before you Exhibits O and P, Exhibit O being a check from the Acme Meat Company to Sam Ormont for \$206.11, and Exhibit P being a check of Sam Ormont to Arthur Pacheco, P-a-c-h-e-c-o, for \$206.11. I believe I understood you correctly this morning that you testified, in answer to Mr. Strong's question, that you did not take into account in determining Mr. Ormont's income for 1943 those items, is that correct? A. Yes, sir.

(Testimony of J. Bryant Eustice.)

Q. You did not use them at all, is that correct?

A. That I did not take them into income.

Q. You did not take them into income at all?

A. No.

Q. I will ask you if you recall on May 29, 1947 testifying in this case with regard to those two exhibits——

Mr. Strong: May I have the page?

Q. (By Mr. Robnett): ——as shown on page 516 of the reporter's transcript, starting with line 5 and ending with line 17.

A. (Examining transcript) Yes, sir.

Q. You gave that testimony, didn't you?

A. That is correct; yes, sir. [885]

Q. And that testimony was as follows:

“Q. Now, Mr. Eustice, that you have seen these two checks just shown you, Exhibits O and P, I will ask you if, as a matter of fact, those items do not show absolutely to you that the item of \$206.11, which you testified about this morning as being unexplained, and therefore charged to income, was not income?

“A. That is correct. If I had observed the situation as it was that would possibly be \$206.11 less, and that would not have been taken into income.”

You also testified, I believe, this morning, that as to Exhibits S and T, S being a check of Acme Meat Company to Sam Ormont for a total of \$13,332.27, dated 4th month, 26th day of 1943, and

(Testimony of J. Bryant Eustice.)

T being an aggregate of checks, eight, I believe, in all, and I think there was an exhibit on which you totaled those—on Exhibit U, you totaled the checks up on Exhibit O as being \$1332.27, the exact amount of Exhibit S—you recall that?

A. That is correct, yes, sir.

Q. I believe you testified this morning that you did not take into account, in determining Mr. Ormont's income for 1943, either Exhibit S nor Exhibit T.

Mr. Strong: If your Honor please, I object upon the ground that the question being asked was as to unreported income which the witness claimed was—— [886]

The Court: Let him finish the question.

Mr. Strong: I thought he had finished.

The Court: Did you finish the question?

Mr. Robnett: Yes.

Mr. Strong: The question here is as to income unreported.

The Court: Let me hear the question.

(Question read by the reporter.)

The Court: No, his testimony this morning was that he did not take that into account as unexplained income or unreported income. That was your testimony this morning?

The Witness: Yes, your Honor, that is correct.

Q. (By Mr. Robnett): You did not take these exhibits, either one of them, into account in deter-

(Testimony of J. Bryant Eustice.)

mining Mr. Ormont's, as you call it, unreported income, is that correct?

A. I am sorry, I did not follow you.

Mr. Robnett: I ask that question be read.

(Question read by the reporter.)

Mr. Strong: I object to that too, because what he testified was he did not include it into unreported income.

The Court: Overruled.

A. At the time I made my audit I did not know all the facts about this check.

Q. Which check? A. Of \$1,332.27. [887]

Q. That is, from the Acme Meat Company?

A. From the Acme Meat Company, yes.

The Court: Exhibit S.

A. I did not take this amount of this check into income, no, sir.

Q. (By Mr. Robnett): I did not ask about the check——

A. I did not know all the facts about it. I don't know yet.

Q. Let us take the other exhibit, composed of these other checks. Did you take that exhibit, or any portion of it, into income in arriving at the alleged unexplained income?

A. I considered this check, amounting to \$1332.27, as money the taxpayer had spent for personal expenditures.

The Court: And called it unreported income?

The Witness: No, sir, your Honor. I did not

(Testimony of J. Bryant Eustice.)

call it unreported income. I called it money used for personal expenditures.

Q. (By Mr. Robnett): But in doing so did you not have to use that in arriving at what you determined was unexplained or unreported income?

A. I used it in the matter of tracing the defendant's funds only.

Q. Only? You did not use it in determining whether or [888] not there was any unreported income, is that correct?

A. The answer would be yes, that I used it in the process.

Q. To determine unreported income, did you?

A. Yes, sir, it was one of the items, or some of the items I had to take into account. I took them into account as money used for personal expenditures.

Q. You took it into account and put it over into the item of living expenses rather than to give it any consideration as funds available to purchase bonds, didn't you? A. That is correct.

Q. And you have already, have you not, testified that if the item was not used for living expenses, but was used to purchase bonds, that it, of necessity, would reduce to that extent what you charged as unreported income?

A. No, sir, not of necessity. [889]

Q. Well, if it had been used to purchase bonds it would have reduced what you had taken on the purchase of bonds as unaccounted for, it would

(Testimony of J. Bryant Eustice.)

reduce the amount that you determined was unaccounted for, would it not?

A. If it could be determined——

The Court: No, would it or wouldn't it?

The Witness: Can I have the question again?

The Court: As a matter of fact, I think you asked him that on cross-examination and the witness answered it would.

Mr. Robnett: Yes, I did. There is no question about that.

The Court: You have the transcript there.

Mr. Robnett: Yes, your Honor.

Q. Referring to Exhibit Y, consisting of eight checks of the Acme Meat Company to Sam Ormont, for a hundred dollars each, making \$800——

A. Yes, sir.

Q. ——did you use those items in arriving at what you determined was Mr. Ormont's unexplained income for 1943?

Mr. Strong: Your Honor, I would like to object on the ground that the question is ambiguous in the use of the word "used".

The Court: I think that was gone into by you, counsel, on your cross-examination in chief. I do not think it is recross. [890]

Mr. Robnett: Very well, your Honor.

The Court: On every one of those checks you went through the same process with the witness.

Mr. Robnett: I understood him to testify this morning that he didn't use them.

(Testimony of J. Bryant Eustice.)

The Court: That he didn't call them unreported income.

Mr. Robnett: If it is distinctly that was then of course it is different. I understood that he said that he didn't use them in arriving at the unreported income.

The Court: No, he didn't say that this morning.

Mr. Robnett: Very well. Thank you.

The Court: He testified that it was not part of the unreported income.

The Witness: Yes, I didn't take these particular checks into unreported income.

The Court: But you did take them into consideration?

The Witness: I took everything I looked at into consideration, your Honor.

The Court: All right.

Mr. Robnett: Very well. That will be all then.

The Court: Any further questions?

Mr. Robnett: No further questions.

The Court: Cross-examination, Mr. Katz?

Mr. Katz: No, your Honor.

Mr. Strong: No further questions. [891]

The Court: The witness is excused.

(Witness excused.)

The Court: Next witness.

Mr. Strong: Mr. Smith.

FRANK B. SMITH

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: May I have your name, sir?

The Witness: Frank B. Smith.

The Clerk: Your address, Mr. Smith?

The Witness: 359 Avenue 64, Pasadena.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Strong:

Q. Mr. Smith, what is your occupation?

A. Accountant, bookkeeper.

Q. I cannot hear you, sir.

A. Accountant and bookkeeper.

Q. Do you know the defendant Sam Ormont?

A. I do.

Q. Did you during the year 1943 have any financial dealings with the defendant Sam Ormont?

Mr. Katz: Just a minute. I object on behalf of the defendant Himmelfarb and make the objection that it is not binding, incompetent, irrelevant and immaterial, and ask that we [892] have the same understanding that the objection and the ruling of the court is made to each question that is asked.

The Court: That is all right. That will be the same ruling; same situation.

The Witness: I gave——

Q. (By Mr. Strong): Just answer yes or no.

A. I did.

(Testimony of Frank B. Smith.)

Q. Approximately when was that?

A. September 28, 1943.

Q. Where did it take place?

A. At the place of business, 4360 Soto Street, Los Angeles.

Q. Your place of business? A. Yes.

Q. Who was present?

A. Mr. Ormont and myself.

Q. Were there any conversations?

A. I gave him a check——

The Court: No, were there any conversations.

The Witness: There were.

The Court: There were?

The Witness: Yes.

Mr. Strong: Did he say there were?

The Court: He said yes. [893]

Mr. Strong: May I have these documents marked for identification, your Honor, separately?

The Court: 48 and 49.

The Clerk: The check dated September 28, 1943 is Exhibit No. 48; the check dated September 23, 1941——

Mr. Strong: That is a note.

The Clerk: Yes, a note, is Exhibit 49.

(The check and note referred to were marked Government's Exhibits 48 and 49 respectively for identification.)

(Exhibiting documents to counsel.)

Mr. Robnett: To save time, we will stipulate that Mr. Smith repaid Mr. Ormont a loan of \$300 on that

(Testimony of Frank B. Smith.)

date and paid off the note that Mr. Ormont had and that there was \$63 or something like that in interest.

Mr. Strong: \$63 interest?

Mr. Robnett: Yes.

Mr. Strong: Received on that date by Mr. Ormont?

Mr. Robnett: Yes.

Mr. Strong: No further questions. I offer these in evidence, your Honor.

Mr. Robnett: No objection.

The Court: Admitted.

(The documents referred to were received in evidence and marked Government's Exhibits Nos. 48 and 49.)

The Court: Cross-examination? [894]

Mr. Robnett: No cross-examination.

The Court: The witness is excused.

(Witness excused.)

The Court: Next witness.

Mr. Strong: Mr. Phoebus.

SAMUEL J. PHOEBUS

recalled as a witness by and in behalf of the Government, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Strong:

Q. You are the same Mr. Phoebus who was sworn here in this trial previously and testified?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. Mr. Phoebus, you testified you were a special agent of the Bureau of Internal Revenue?

A. Yes, sir.

Q. When did you become a special agent of the Bureau of Internal Revenue?

A. July 1, 1945.

Q. Were you employed by the Treasury Department prior to that time, by the Bureau of Internal Revenue? A. Yes, sir.

Q. What was your capacity prior to that date?

A. I was a deputy collector. [895]

Q. You were a deputy collector until July 3rd, did you say, 1945? A. July 1st.

Q. July 1st, 1945? A. Yes, sir.

Q. Now, Mr. Phoebus, during May of 1945 did you have occasion to investigate the income tax returns of the defendant Sam Ormont for the years 1942, 1943 and 1944 and the defendant Phillip Himmelfarb for the year 1944?

Mr. Katz: Objected to, if the Court please, as incompetent, irrelevant and immaterial, no proper foundation laid, not within the issues of this case.

The Court: Overruled.

The Witness: I had an assignment at that time to make an investigation of the income tax returns of Mr. Ormont and Mr. Himmelfarb for the year 1944.

Q. (By Mr. Strong): Not '42 or '43 as to Ormont? A. Not '42 or '43.

Q. That was when you were deputy collector?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. And did you on or about the date of May 18, 1945 go to the premises of the Acme Meat Company? A. Yes, sir.

Q. Who was with you? [896]

A. Another deputy collector, Walter E. Schlick, S-c-h-l-i-c-k.

The Court: Let me hear the last previous question, Mr. Reporter.

(The record referred to was read by the reporter as set forth above.)

The Court: That was as a deputy collector?

The Witness: Yes, sir.

The Court: And not as a special agent?

The Witness: No, sir.

Mr. Strong: Is there a pending question?

The Reporter: No. [897]

Q. And did you see and speak to either Mr. Ormont or Mr. Himmelfarb that day, on the premises of the Acme Meat Company? A. Yes, sir.

Q. Which? A. With Mr. Ormont.

Q. Now, did you on that day have any discussion with Mr. Ormont, on the premises, as you testified, concerning Mr. Ormont's income for the year 1944?

A. Yes, sir.

Mr. Robnett: I object to this, if the Court please, on the ground that it is incompetent, irrelevant and immaterial; no proper foundation laid; not shown that the defendant in any discussion, if they had any, was forewarned of what their business was, or of his constitutional rights.

(Testimony of Samuel J. Phoebus.)

The Court: This witness went to see Mr. Ormont as a Deputy Collector of Internal Revenue. I can take judicial notice of the fact that a Deputy Collector of Internal Revenue is not authorized, under the law, to investigate asserted or alleged criminal violations. His function is to collect. I, therefore, don't think that in any investigation that was made in connection with the attempted collection of a tax by a Deputy Collector, the Deputy is under a duty to warn the taxpayer. The objection will be overruled.

The Witness: Will you repeat the question, please? [898]

The Court: You answered it. He was objecting by way of a motion, a motion to strike, which will be denied. I take it the same objection will be made on further efforts to secure this conversation, Mr. Robnett?

Mr. Robnett: I beg your pardon?

The Court: I take it this same objection will go to the whole conversation?

Mr. Robnett: Yes, indeed. And I believe, your Honor, that the objection as to the conversation, even though the man was not investigating in a certain way, attempts afterwards to use the evidence in a prosecution should be suppressed on the grounds stated, and I move to suppress any conversation on the ground now that he is coming in as a witness in a criminal prosecution, and if the Government can do that, by a man, growing out of

(Testimony of Samuel J. Phoebus.)

that kind of an excursion, it would be getting it in in the back door.

The Court: Can you proceed to some other matter, Mr. Strong?

Q. (By Mr. Strong): I show you Government's Exhibit 42 for identification, which is a list of bonds, and ask you if you ever saw that before.

A. Yes, sir.

Q. Where and when did you first see it?

Mr. Robnett: I object to that upon the ground that it is [899] incompetent, irrelevant and immaterial, where and when he first saw it, unless they bring it directly home to the defendant as being present at the time, and therefore it is hearsay testimony.

Mr. Strong: I can't do it in one fell swoop, your Honor.

The Court: The objection will be overruled.

A. I saw it at the Bank of America at Brooklyn and Cummings, on May 25, 1945.

Q. Did you prepare that list? A. No, sir.

Q. Do you know who prepared it?

A. Yes, sir.

Q. When was it prepared? A. When?

Q. When?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial.

A. In the afternoon——

The Court: Just a minute.

The Witness: I am sorry.

(Testimony of Samuel J. Phoebus.)

Mr. Robnett: As incompetent, irrelevant and immaterial, and hearsay testimony.

The Court: There is no foundation laid. Ask him if he knew who prepared it.

Mr. Strong: He said yes. [900]

Q. Who did prepare it?

A. William Malin, a certified public accountant.

Mr. Robnett: I move to strike the answer, if the Court please, on the same ground as my objection, and as not binding upon the defendant, not connected up in any way, hearsay testimony, and a conclusion on the part of the witness as to who prepared it.

The Court: Did you see him prepare it?

A. Yes, I did. I was there all the time and verified these things as they were being written down here.

Mr. Robnett: I move to strike out all of his statement.

Mr. Strong: That goes to the weight of it.

The Court: Motion denied.

Mr. Strong: Shall I proceed, your Honor?

The Court: I might just as well settle this question now. Proceed with your question.

Q. (By Mr. Strong): The figures and dates, and other material appearing on Government's Exhibit 42 for identification, did you compare them with the bonds which were being examined and from which this material was being copied on the occasion to which you have just testified?

Mr. Robnett: To which we object, if the Court

(Testimony of Samuel J. Phoebus.)

please, on the ground that it is hearsay testimony as to the defendant. It is not shown that he was present, or they were his bonds or [901] that he knew anything about it. No proper foundation has been laid for any such testimony.

Mr. Strong: If your Honor please, the testimony is that these bonds were in the name of the defendant.

The Court: What testimony?

Mr. Strong: These are bonds that Mr.——

The Court: What testimony is there?

Mr. Strong: Mr. Eustice testified on cross-examination as to each of these bonds.

The Court: That all of these bonds on the list were in the name of the defendant?

Mr. Strong: Yes.

The Court: That does not get around the hearsay rule.

Mr. Strong: We will establish the connection later. This is part of the connection. It takes three people in this case.

The Court: I think his objection is good under the hearsay rule.

Q. (By Mr. Strong): Going back to May 15, 1945, the occasion on which you testified you spoke to Mr. Ormont, on the premises of the Acme Meat Company, with reference to Mr. Ormont's income, will you please state what you said to Mr. Ormont, and what Mr. Ormont said to you in that connection?

Mr. Katz: I object, if the Court please, upon the ground that it is incompetent, irrelevant and

(Testimony of Samuel J. Phoebus.)

immaterial, and not [902] within the issues in this case.

The Court: That is on behalf of the defendant Himmelfarb?

Mr. Katz: That is the only one for whom I appear.

The Court: The objection will be sustained as to Mr. Himmelfarb.

Mr. Robnett: Will it be understood that my prior objection to similar questions has been made?

The Court: I think you had better state it for the record.

Mr. Robnett: I object upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; there has been no showing that this man advised the defendant Ormont what his purpose was there, or that anything he might state could be used against him; that he had a constitutional right to refuse to answer; and no proper foundation.

The Court: I think, in view of what I stated a little while ago, that the objection should be and it is overruled. [903]

Mr. Robnett: And on the further ground that there has been no corpus delicti established as to the defendant Ormont.

The Court: Overruled.

The Witness: Will you repeat the question, please?

(The question referred to was read by the reporter as set forth above.)

(Testimony of Samuel J. Phoebus.)

Mr. Strong: That is May 18, 1945.

The Witness: May 18 is the correct date.

I told him that we had an assignment to make an examination of his income tax returns——

Mr. Robnett: Will you speak a little louder?

The Witness: I am sorry.

I told him that we had an assignment to make an examination of his income tax returns and that we would like to see his retained copies of the 1944 income tax return.

He said that he didn't have it there, that it was home and that he would bring it down on a later occasion.

We asked him if all of the income which he had received was recorded on the books of the Acme Meat Company, and he said yes, it was.

We asked him if he had ever been required to pay to other people amounts which he had not recorded on his books and he said no.

We questioned him a little further and finally he said yes, there were some amounts that were paid over that are on [904] the books.

Mr. Robnett: If the Court please, although this is conversation I move to strike this testimony on the ground that this witness is now testifying as to other matters that he talked about in the conversation other than income. He is talking about matters of payments by the defendant.

The Court: That all goes to the general subject matter. The objection is overruled.

The Witness: After he had admitted that he

(Testimony of Samuel J. Phoebus.)

had made such extra payments, I asked him the question whether or not he had attempted to pass these over-payments on to his own customers, and he said no, he hadn't, that all of his income was recorded on his invoices and on his books and records.

He then asked me hypothetically, he said to me, "Supposing the Government inspector had graded A meat, meat which I had paid A prices for, as B meat"—I wish to change that.

The question was cast in a hypothetical manner. He said, "If a packer found himself in a situation where he had bought meat at A prices and the grader had graded it as B, if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they in that event come in and attempt to determine his income on the presumption that all such sales had been made on this basis?"

And I told him no, that that was not the way that we [905] used in arriving at a taxpayer's income.

I suggested that the next occasion—I think we made an appointment with him for the 22nd of May—and I suggested on that occasion that he bring his individual income tax return with him and also to prepare in the meantime a statement of his present net worth.

I think I asked him on that occasion too whether or not he and Phillip Himmelfarb were partners, and he said no.

Q. (By Mr. Strong): Now subsequent to May

(Testimony of Samuel J. Phoebus.)

18, did you have a further conversation with the defendant Sam Ormont in connection with his income for the year 1944?

Mr. Schlick and I——

Q. Just say yes or no. A. Yes.

Q. When did it take place?

A. May 23, 1945.

Q. Where did it take place?

A. At the plant of the Acme Meat Company.

Q. Who was present?

A. Mr. Bircher of the Bureau of Internal Revenue and myself and Mr. Ormont.

Q. Will you state what conversation took place with Mr. Ormont on that occasion respecting the income of Ormont for 1944? [906]

Mr. Katz: Objected to, if the Court please, as hearsay as to the defendant Himmelfarb, incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: I didn't hear all of that objection.

Mr. Strong: It is the same thing.

The Court: Objection sustained.

Mr. Robnett: I wish to interpose the same objection to this conversation that I did to the prior one.

The Court: I think it becomes material to know who Mr. Bircher was, whether or not he was a deputy collector of a special agent.

Is Mr. Bircher the gentleman in the courtroom?

The Witness: Yes, sir.

The Court: Was he at that time a special agent of the Internal Revenue Bureau?

The Witness: Yes, sir.

(Testimony of Samuel J. Phoebus.)

The Court: In your conversation with Mr. Ormont at that time did either you or Mr. Bircher state to him that he need not answer any questions or that if he did any questions he might answer, his answers might be used against him or any information he gave?

The Witness: On that occasion I don't remember any such warning having been given to Mr. Ormont.

The Court: Your best recollection is that it was not?

The Witness: My best recollection is that it was not. [907]

The Court: Objection sustained.

Mr. Strong: I don't want to go into it further, but if it is on the basis of no warning I just won't go into it.

The Court: On the basis of no warning and there was present an agent authorized under the law and the regulations to investigate and investigating alleged criminal violations of the law.

Mr. Strong: There is no evidence that he was investigating alleged criminal violations.

The Court: What was he doing there?

Mr. Strong: Your Honor took judicial notice of a fact which I would like to contradict. I don't think that the special agent's duties are solely for the purpose of criminal investigation. They have a lot of other duties wholly unrelated to criminal investigations. There is no showing that this was with reference to a criminal investigation at all.

(Testimony of Samuel J. Phoebus.)

The Court: The fact that we are here today shows that it was.

Mr. Strong: Then I can't go further beyond that.

Q. Now did you have any conversation subsequent to the date of May 23, 1945? That is the one to which objection was sustained. Did you have any subsequent to that date? A. Yes.

Q. When was the subsequent one?

A. The following day, May 24. [908]

Q. 1945? A. 1945.

The Court: Were you at that time still a deputy collector?

The Witness: Yes, sir.

Q. (By Mr. Strong): You were a deputy collector until July 1, 1945?

A. Yes, sir—June 30th.

Q. And where did such conversation on May 24 take place?

A. In the office of the intelligence unit on the eighth floor of this building.

Q. Who was present?

A. Mr. Ormont, Mr. Bircher, Mr. Schlick, a deputy collector, and myself, also a deputy collector.

Q. Was anything said on that occasion to Mr. Ormont regarding his rights to testify or not to testify? A. Yes, sir.

Q. By whom? A. By Mr. Bircher.

Q. Do you recall what was said?

A. Yes, sir.

Q. Will you state what was said?

(Testimony of Samuel J. Phoebus.)

A. Mr. Bircher first asked him if he wanted to have an attorney present. [909]

Q. Asked whom?

A. Asked Mr. Ormont if he wanted to have an attorney present.

Do you want me to give his replies or merely the questions that were asked, the statements that were made?

The Court: Not his replies but was Mr. Bircher said to him concerning his rights.

The Witness: I see. That was the first occasion when these announcements were made to Mr. Ormont.

He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

This is my best recollection of it, or the reply to your question.

Q. (By Mr. Strong): You heard that said, didn't you? A. Yes, sir; I was there.

Q. And Mr. Ormont was present, that is, this Mr. Ormont? A. That Mr. Ormont.

The Court: Now in response to the first question that he was *not* entitled to an attorney, what did Mr. Ormont say?

Mr. Katz: May I at that point interpose another objection, that this conversation is not binding on the defendant [910] Himmelfarb?

(Testimony of Samuel J. Phoebus.)

The Court: And the grounds?

Mr. Katz: Same grounds.

The Court: Objection sustained.

The Witness: Mr. Ormont said he didn't think he needed an attorney to tell the truth, that the thing had been bothering him, worrying him, and he wanted to get it off his mind so that he could go around and look people in the face again. And he repeated that he didn't think he needed an attorney to tell the truth.

Mr. Robnett: If the Court please, move to strike out that answer on the ground that it is incompetent, irrelevant and immaterial. That portion of it where he said he didn't think he needed an attorney to tell the truth might be responsive, but all the rest of it I don't think is in answer to that question. I think it is incompetent. It is improper to go into it at this time. There was no such warning that I think the law contemplates of his rights in this matter. And as to the fact that they might use it at the time against him, he said that Mr. Bircher said in connection with some other matter, some matter. He didn't tell him as to this particular one, if I understand his answer. I don't know what the other matter was, but that is the way I got the answer to the original question.

The Court: Some subsequent court proceedings, he said. [911]

Mr. Robnett: Yes, but I think if the answer were reread as to what Mr. Bircher was supposed to have told him, I think you will find that he said

(Testimony of Samuel J. Phoebus.)

that Mr. Bircher told him in connection with some other matter.

Q. (By Mr. Strong): Is that what Mr. Bircher said, in connection with some other matter?

Mr. Robnett: Wait a minute. I think we should have the answer read.

The Court: Yes, I think so.

(The record referred to was read by the reporter as follows:

“Q. Will you state what was said?

“A. Mr. Bircher first asked him if he wanted to have an attorney present.

“Q. Asked whom?

“A. Asked Mr. Ormont if he wanted to have an attorney present.

“Do you want me to give his replies or merely the questions that were asked, the statements that were made?

“The Court: Not his replies but what Mr. Bircher said to him concerning his rights.

“The Witness: I see. That was the first occasion when these announcements were made to Mr. [912]

“He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

(Testimony of Samuel J. Phoebus.)

(“This is my best recollection of it, or the reply to your question.”)

Mr. Robnett: Do you see what I mean, your Honor?

The Court: Yes, I do.

That is all that was said to him concerning his rights?

The Witness: I think, your Honor, before we launched into a discussion of Mr. Ormont's income tax liability, Mr. Bircher said, “All right, then, we will go on and ask you questions and if you don't want to answer any of them just don't answer it, just say so and we will go on to the next question.”

The Court: That is all?

The Witness: Yes, sir.

Mr. Robnett: Now I urge the force of my objection, your Honor, that he wasn't warned that anything would be used against him. He is entitled to be warned as to that. Merely telling a man that he doesn't have to answer is one thing, and if you tell him if he does answer it will be used against him is another thing. [913]

Mr. Strong: That is what they told him, your Honor.

The Court: No.

Mr. Strong: He told him it would be used against him.

The Court: Well, I think probably it is sufficient. It is awfully thin though.

Mr. Strong: Of course it is much heavier than

(Testimony of Samuel J. Phoebus.)

I think it ought to be, but I have to take your Honor's ruling.

The Court: The objection is overruled. The motion is denied.

Q. (By Mr. Strong): Will you state what was said to Mr. Ormont and what Mr. Ormont said in reply in connection with his income for the year 1944 on the occasion to which you have just referred?

Mr. Katz: It is understood, if the Court please, that the objection goes to all of this witness' testimony relating to these conversations with Mr. Ormont?

Mr. Strong: So stipulated.

The Court: That is right. The jury will be instructed to disregard it as to the defendant Phillip Himmelfarb.

Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?

The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without [914] repeating it.

Mr. Robnett: Thank you.

Mr. Strong: Does your Honor want to start the conversation now or start a recess?

The Court: We will have a short recess. Remember the admonition.

(Short recess.) [915]

(Testimony of Samuel J. Phoebus.)

Mr. Strong: So stipulated.

The Court: The question is what was said.

The Witness: This was on the occasion of the 24th——

The Court: The interview in the office of Mr. Bircher.

Q. (By Mr. Strong): On the 24th.

A. After the conversations which I have reported here just a minute ago in relation to warning Mr. Ormont——

Mr. Robnett: Speak louder, please.

A. After the conversations took place that I have just recounted a few minutes ago in regard to warning Mr. Ormont of his constitutional rights, Mr. Bircher asked Mr. Ormont to give a brief statement of his business history, and he indicated that he had started in——

Q. Who is “he,” in proper names, give them instead of the pronoun.

A. Mr. Ormont indicated that he had started in partnership with Frank Salter in 1931, known as the Acme Meat Company, and had continued in that partnership until March, 1943, when Mr. Salter retired. That he had continued——

Q. Who is he?

A. That he, Ormont, had continued to operate the Acme Meat Company as sole proprietor until May 1st, 1944, at which time he became associated with Mr. Himmelfarb. That he and Himmelfarb had a verbal agreement to share the legitimate [916] profits of the Acme Meat Company as follows: The

(Testimony of Samuel J. Phoebus.)

first \$24,000 of net profits would be shared equally between them, all amounts over of legitimate net profit would go to Ormont, and in addition to that he said, Ormont said, that they had an agreement to share the collection of overcharges from the operations of the Acme Meat Company on a fifty-fifty basis, and that those operations had started May 1st, 1944, and had been discontinued on May 18, 1945, and that for those years their profit had been \$35,000 apiece, about. Mr. Bircher asked him if he had the exact figures and he——

Q. Who is he?

A. Mr. Ormont pulled out a little memo pad, a sort of imitation gold fringed, a rather small thing, two by four, and in this book was written figures. I don't remember the exact figures, but it showed that from May 1st, 1944 until January 5, 1945 the amount was, roughly, \$12,000, and from January 6, 1945 until April 30, 1945 the balance was what was remaining of the \$35,000——

Mr. Robnett: Just a minute. All of this 1945 the witness testified to is objected to as not within the issues in this case. We are only going into the 1944 investigation. It is improper to put in evidence here of any kind, and any other year not involved here. It is not charged in the indictment. The charge is as to his income in 1944, and previous years; therefore it is incompetent, irrelevant and immaterial, and the witness is giving a conclusion as to what some papers [917] show, and not pure conversation.

(Testimony of Samuel J. Phoebus.)

The Court: Is that what Mr. Ormont said it showed, or did you see the paper?

A. He produced the paper in response to the question as to what was the exact amount of income which he had received in this fiscal year.

The Court: Do you mean he handed it to you, or did he read that?

The Witness: He handed it to Mr. Bircher.

The Court: Did you see it?

The Witness: Yes, I saw it.

The Court: I think the conversation is admissible.

Mr. Robnett: This is not part of the conversation. It is not responsive to the question.

The Court: I think it is part of the conversation. Suppose he had just chosen to write his answers.

Mr. Strong: I think it is what he did. The question is as to what he did.

The Court: That's his answer to the question, when he hands him a piece of paper. The objection will be overruled. At the appropriate time I will, of course, instruct the jury that they are to regard all oral admissions of the defendant with caution, other than those received or made by him on the witness stand.

Mr. Strong: Go ahead. [918]

A. He——

Q. Who was he?

A. Mr. Ormont then gave, at Mr. Bircher's request, gave a piece of paper from the notebook

(Testimony of Samuel J. Phoebus.)

that he had the original notation in, and this piece of paper Mr. Bircher copied the figures, showing the breakdown of the income as it had been received as between 1944 and 1945; and Mr. Ormont said that he had already filed a fiscal year return covering the amounts which were shown on that paper, and Mr. Bircher asked him: When did you file it? And he said it was filed today. Then Mr. Bircher asked him if there was any way that we could verify these amounts, or would we have to accept the figures which he gave?

Q. Who is he?

A. Which he, Mr. Ormont, gave. May I stipulate that hereafter he——

Mr. Strong: No, there are too many people present.

The Court: Yes, I think that is right. [919]

The Witness: Mr. Ormont was asked if there was any way that we could verify the amounts of money that had been received or would we have to accept the figures which he, Mr. Ormont, gave us.

Mr. Ormont said, no, there wasn't any way that he could give us to verify the amounts, that no record had been kept of it except that they would write down the amount that they had accumulated to date and when they accumulated an additional amount they would throw away the old piece of paper and retain only the current one which showed the amounts collected up to date.

Mr. Bircher asked him what the origin of the

(Testimony of Samuel J. Phoebus.)

funds was, and he said that they were collections from customers of Acme Meat Company.

So Mr. Bircher asked Mr. Ormont if he could give us the names of a few customers that we might go to to verify it, and Mr. Ormont said that he didn't see any use in giving us the names of the customers because they wouldn't provide any basis for verification; that the prices charged these people fluctuated, there was no uniform charge per pound made for these overcharges, and that sometimes no charges were made to a customer.

At the beginning of this interview, after Mr. Bircher told Mr. Ormont that any time he wanted to stop and didn't want to answer a question that he should tell us, why Mr. Bircher told him that we would prepare, as we went only, notations [920] as to what he said with the view of preparing an affidavit for Mr. Ormont to sign.

Mr. Bircher asked him at that time if he minded if we brought a stenographer in to take a stenographic record of the interview, and Mr. Ormont said that he preferred that a stenographer was not present.

So close to the end of the interview Mr. Bircher wrote up an affidavit which in general indicated——

The Court: Just a moment. Not what the affidavit was, unless it was communicated to the defendant.

The Witness: He sat next to Mr. Bircher at the table and they wrote the affidavit sentence by sentence and discussed each sentence as it was phrased on the affidavit.

(Testimony of Samuel J. Phoebus.)

And of course I don't remember the affidavit verbatim, but the essence of it was——

Mr. Robnett: Just a moment, if the court please. I submit that the affidavit would be the best evidence.

The Court: Yes, that is the best evidence.

Q. (By Mr. Strong): Mr. Phoebus, do you know where the affidavit is? A. No, sir.

Q. Did you see it at any time after this time that you testified to as being prepared?

A. Mr. Bircher put it in his brief case.

Q. Did you see it at any time thereafter? [921]

A. Yes, I saw it later the same day when he went to the Acme Meat Company plant.

Q. Do you know what happened to the affidavit? A. Yes.

Q. Will you state what happened?

A. We were up there interviewing Mr. Himmelfarb in connection with the same matter and we were attempting to draft an affidavit of a similar kind that was acceptable to Mr. Himmelfarb——

Mr. Katz: Objected to, if the court please, as no proper foundation laid, calling for a conclusion of the witness, as to any testimony as to what they were trying to do with Mr. Himmelfarb.

The Court: Yes, that may be stricken. There is no foundation.

Q. (By Mr. Strong): Just tell us what happened to the other affidavit.

The Court: Did you leave it there?

The Witness: Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. (By Mr. Strong): State what happened to it.

The Court: Well, he left it there.

Mr. Strong: He didn't, your Honor.

The Court: He just said he left it there.

The Witness: That is not an exact response, your Honor. [922]

Q. (By Mr. Strong): Would you explain what happened to it?

The Court: Without explaining any conversations with Mr. Himmelfarb.

Mr. Strong: That is right.

The Witness: We were in the office, Mr. Bircher, Mr. Schlick, myself, Mr. Ormont and one of the other defendants.

Mr. Katz: If the Court please, I submit that that doesn't make it any better.

Mr. Strong: He is just saying who was present.

The Court: Yes, that is right.

The Witness: And Mr. Ormont asked Mr. Bircher to see the affidavit which he had, he, Mr. Ormont, had previously signed in the office of the Intelligence Unit, and Mr. Bircher reached into his pocket——

Mr. Robnett: I object to this on the ground the witness keeps speaking of an affidavit. That is a conclusion. There is no showing that it was ever signed by Mr. Ormont or anything of the kind.

Mr. Strong: He just said it was.

The Court: No, he didn't say it was signed; he

(Testimony of Samuel J. Phoebus.)

said they wrote it sentence by sentence but he didn't say it was signed or sworn to.

Mr. Strong: I think the last statement was that it was signed. May I have the record read? [923]

The Court: Did Mr. Ormont sign it that day upstairs?

The Witness: Yes, sir; he did.

The Court: Was he sworn?

The Witness: He was properly sworn.

The Court: Who swore him?

The Witness: Mr. Bircher.

The Court: "Properly" is a conclusion.

The Witness: Mr. Bircher swore him.

The Court: What did he say?

The Witness: He asked him to raise his right hand and said, "Do you solemnly swear that the information on this affidavit and the facts set forth are correct and true to the best of your knowledge?" And there was a jurat form on the bottom of the affidavit.

The Court: Very well.

Q. (By Mr. Strong): Now tell us what happened to it?

A. Mr. Ormont asked Mr. Bircher if he could take a look at the affidavit which he, Mr. Ormont, had previously signed in the office of the Intelligence Unit. Mr. Bircher reached into his brief case and brought out the affidavit and handed it to Mr. Ormont. Mr. Ormont had already in his hand an affidavit which had been prepared, tentatively prepared but not signed, by Mr. Himmelfarb and—

(Testimony of Samuel J. Phoebus.)

Mr. Katz: Objected to, if the Court please, and move to [924] strike on the ground it is incompetent, irrelevant and immaterial, with respect to anything prepared or tentatively prepared by the defendant Himmelfarb. There is no foundation laid, no corpus delicti established.

The Court: There isn't any foundation laid for that. Go ahead. The jury is instructed to disregard that statement as to the defendant Himmelfarb.

The Witness: He took these two documents——

Q. (By Mr. Strong): Who is he?

A. He, Mr. Ormont, took these two documents and began to fold them up and started to put them into his pocket, and Mr. Bircher, seeing what was happening to his affidavit, to Mr. Ormont's affidavit——

Mr. Robnett: I move to strike that out as a conclusion.

The Court: That is a conclusion.

Q. (By Mr. Strong): State what was done and said.

A. Mr. Bircher reached over and took hold of the affidavit himself, and there was a physical tussle which ensued, and in the middle of this physical tussle Mr. Ormont shook himself violently and threw Mr. Bircher back against the wall, and Mr. Ormont disappeared out of the door of the office and went down to the dock, the slaughtering dock, or the loading dock, and that is the last that I saw of the affidavit. [925]

(Testimony of Samuel J. Phoebus.)

Q. (By Mr. Strong): Now getting back to the conversation which you were having in the office earlier that day, where you were discussing the preparation of this affidavit, will you continue with your conversation?

A. Yes. Mr. Ormont said that most of these collections that were not recorded on the invoices of the Acme Meat Company had been collected by Mr. Himmelfarb because he, Ormont, was out buying stock all day, either in the country or in the stock-yards, and Himmelfarb's duties required him to remain in the plant and therefore that he had made the collections, the collections that were not recorded on the invoices, he made these himself.

Q. Who is he?

A. He, Himmelfarb, had made these collections.

Mr. Katz: If the Court please, it is my understanding that this conversation is all subject to the rulings and understandings heretofore made?

The Court: That is right, not binding on the defendant Himmelfarb.

Mr. Strong: Until I ask it to be applied.

The Court: It is not binding on the defendant Himmelfarb. The jury is instructed to disregard it as to the defendant Himmelfarb, as no foundation laid.

The Witness: I asked Mr. Ormont on this occasion if the [926] amount of income which he showed us there was a gross income or a net income; that is, whether or not there were any expenses to this joint enterprise which he claimed

(Testimony of Samuel J. Phoebus.)

to have had with Mr. Himmelfarb, and he said no, that any over-charges which they had been required to pay were deducted on the book of the Acme Meat Company from the regular operations, and that the amount of money which they received from their customers was the gross and the net, that the gross and the net were the same.

We told him that we planned to go out to the plant and discuss these matters with Mr. Himmelfarb, and he said he had already discussed his plan to make a disclosure to us with Himmelfarb and that Himmelfarb would be cooperative.

We asked him where the money went that he collected, the \$35,000, and he said that approximately \$7,000 had been put into his bank account in his personal checking account in the Citizens Bank and that part of the rest, or most of the rest had been re-invested in the business.

He said the collections were made mostly in currency.

Q. (By Mr. Strong): Was there any discussion as to bonds?

A. Yes, he said——

Q. Who is he?

A. He, Mr. Ormont, said that he had, that Mr. Ormont had, a safety deposit box at Brooklyn and Cummings in which he [927] had government bonds approximating \$90,000. He didn't refer to these necessarily as having their origin from these——

Q. Tell us what he said, not what he didn't.

A. We asked him about loans from other per-

(Testimony of Samuel J. Phoebus.)

sons, and he said that there were \$14,000 or \$15,000 shown on the books of the Acme Meat Company as loans from Dora Goldberg, but he, Ormont, said that only \$6500 of these loans were legitimate, that is, that had their origin from his mother.

I think that constitutes the essence of the conversation on May 24th.

Q. You didn't go into the contents of the affidavit?

A. The affidavit, the way I remember it, set forth the fact that——

Mr. Robnett: I object to that, if the court please, on the ground that the affidavit would be the best evidence, and this is secondary evidence, incompetent, irrelevant and immaterial, asking for an opinion of the witness as to what it contained. They haven't shown but what they have copies.

The Court: Do you have a copy of the affidavit?

The Witness: No, sir.

The Court: Did you make a copy of it?

The Witness: No, sir.

The Court: Did Mr. Bircher, to your knowledge?

The Witness: No, sir.

The Court: That was the only copy of the affidavit? [928]

The Witness: Yes, sir; there was no carbon.

The Court: It was handwritten?

The Witness: It was handwritten; yes, sir.

(Testimony of Samuel J. Phoebus.)

The Court: And that is the handwritten affidavit that you took out to the Acme Meat Company?

The Witness: Yes.

The Court: The objection is overruled.

The Witness: The affidavit set forth that, he, Ormont, and Himmelfarb had been operating on a fiscal year——

Mr. Katz: If the Court please, in so far as the document is offered as against the defendant Himmelfarb——

The Court: It is all the same conversation.

Mr. Katz: This, as I understand it, is the contents of a document.

Mr. Strong: Same objection.

The Court: It was conversation before it got on the document.

Mr. Katz: All right, your Honor.

The Court: It is admissible not against the defendant Himmelfarb, no foundation has been laid, and the jury is instructed again to disregard it. Go ahead.

The Witness: The affidavit set forth that he and Himmelfarb had been operating this joint venture and collecting overcharges from the customers of the Acme Meat Company, and then reproduced the amounts which appeared on that slip of paper [929] which Ormont gave which contained approximately \$12,000 received by Ormont in 1944 and \$23,000 in 1945, and set forth further that both of them, each of them, had received this amount.

(Testimony of Samuel J. Phoebus.)

It set forth that no books and records had been kept with respect to these amounts, and that it was not reported on the 1944 income tax return. [930]

Q. I have now placed before you various documents, bank records, the record of Merrill Lynch——

The Court: And so forth.

Q. (By Mr. Strong): And so forth, and other documents, and I also place before you Government's Exhibit 40 for identification, the working papers, and I will ask you——

The Court: That is, the working papers of the witness Eustice?

Mr. Strong: The witness Eustice, and you will find in those working papers red place markers. Will you turn to each of those pages and state whether those pages which have those markers were prepared by you?

A. Shall I replace the markers?

Q. Yes, leave them there. May we have him put an X on there? That is what I suggested originally. They may get lost.

Yes, you can put an X on there. We have a lot of markers. You can put an X on there, and it won't come out. And put your initials on each of the pages.

A. In the left-hand corner?

The Court: You might leave the marker there, so counsel in the trial can readily find the page without too much effort.

(Testimony of Samuel J. Phoebus.)

The Witness: Do you want me to state, as I mark my initials on it, the document?

Mr. Strong: Yes, please.

A. The capital account of Sam Ormont from January 5, 1931 through March 31, 1943. This I copied from the books of the Acme Meat Company, in their office. The entire page is not written by me, but merely the figures.

Q. Will you circle in red the part you wrote?

A. I also copied the withdrawal account of Sam Ormont, described on the top of my work sheet as summary from March 6, 1937 until March 31, 1943.

Mr. Robnett: Just a minute, your Honor. I would like to move to strike out the answer for the purpose of objecting on the ground that this evidence is incompetent, irrelevant and immaterial, and there is no proper foundation laid for it.

The Court: He is not offering them in evidence yet.

Mr. Robnett: He is telling what he did copy. He is putting evidence in that he copied certain things, withdrawals, and certain things. I think it would become evidence, the way he is marking it. If he would just mark the document, without designating what they are. If he is going to tell what they are, he is putting in evidence here that there were some things that he copied.

The Court: He is not giving the contents of the document. It is like saying: Well I painted a picture. You have the painting hanging in front of the jury, but the picture is against the wall. Until the

(Testimony of Samuel J. Phoebus.)

jury sees the picture, how are [932] they going to tell that it is what somebody painted?

Mr. Robnett: That is true; but I figure that what he says he copied, that he copied certain things of record. the records would be the best evidence. It is secondary, and secondly, if the records were obtained from the defendants——

The Court: He will have to lay foundation in order to offer their contents. This is preliminary, I suppose, to such an effort.

Mr. Strong: Yes.

The Witness: Next is a capital account of Frank Salter, which I copied, from January 5, 1931 until March 31, 1943.

Q. Will you circle that in red, please?

A. The whole page is what I copied. There are no other figures on there. The next is an account described as Sam Ormont and Frank Salter, doing business as the Acme Meat Company. It is a trial balance, and copies of the balances in the accounts as of December 31, 1941. The same sort of a document, except that it refers to the trial balance for the period ended as of December 31, 1942. And another as of March 31, 1943. This is a record of the commercial account of Sam Ormont with the Security First National Bank in Huntington Park, covering the period March 15, 1932 until December 8, 1934. This is the commercial account of Sam Ormont in the Security First National Bank, Huntington Park, from January 8, 1940 through April

(Testimony of Samuel J. Phoebus.)

28, 1943. I am [933] marking out the portions that are Mr. Eustice's handwriting.

Q. Why don't you circle the ones that are in yours?

A. Because in this case mine constitute most of the writing on the page. This is the transcript of Sam Ormont's commercial account with the First National Bank of Vernon. It covers the period from December 31, 1930 to April 18, 1931. That is all.

Q. Are there any pages left with markers which you did not initial?

A. No, sir, I don't think so.

Q. Look at it and make sure, please.

A. That's all.

Q. Did you have any discussion with the defendant Sam Ormont on May 25, 1945?

A. Yes, sir.

Q. Who was present?

A. Mr. Malin, Mr. Bircher, Mr. Slick and myself.

Q. Was Mr. Ormont there?

A. Mr. Ormont was there.

Mr. Robnett: What date was that?

Mr. Strong: May 25.

Q. What year? A. 1945.

Q. And where did the discussion take place?

A. In one of the booths close to the safe [934] deposit boxes at the Bank of America, Brooklyn and Cummings.

Q. Will you state what was said by Mr. Ormont and by you?

(Testimony of Samuel J. Phoebus.)

Mr. Katz: Same objection, if the Court please.

The Court: Same ruling.

Q. (By Mr. Strong). About bonds. Did you discuss bonds?

A. Mr. Ormont had the bonds, which Mr. Malin was preparing the list of, and we would go through—Mr. Ormont would read or look at the bond, and hand it to me or to Mr. Bircher, and he in turn would read it to Mr. Malin, who would write it down. And he remarked—Mr. Ormont volunteered the statement, when he read that the bonds were in the name of his mother and himself,—he volunteered the statement that he had done that merely for convenience; that you could never tell what might happen to you; so that there would not be any trouble in case of death, he had put his mother's name on the bonds. We came across one or two bonds which showed the name of Mr. Ormont only, and he asked us if we knew whether he could have his mother added there as a co-tenant of the bond, without it affecting the holding period or rate of interest accruing on the bond. [935]

Q. I show you Government's Exhibit 42 again and ask you whether this was the list that was being prepared on that occasion.

A. Yes, sir; this was the list.

The Court: Was it all prepared on that occasion?

The Witness: Yes, sir.

The Court: Who is Mr. Mailin? Was he another agent?

(Testimony of Samuel J. Phoebus.)

The Witness: No, he is a certified public accountant and employed——

The Court: I remember, a certified public accountant.

Q. (By Mr. Strong): Did you bring Mr. Mailin in? A. No, sir.

Q. Who did?

Mr. Robnett: Objected to as asking for an opinion of the witness.

Mr. Strong: If he knows.

The Court: That does call for a conclusion. The objection is sustained. Who brought him in calls for a conclusion.

Mr. Strong: He might know.

The Court: He might have come in with somebody but that doesn't necessarily mean that they brought him.

Q. (By Mr. Strong): Did he come with anybody? A. Yes. [936]

Q. Who?

A. He came in with Mr. Ormont.

Q. Did Mr. Ormont say anything to Mr. Mailin?

A. No.

Q. Had you met Mr. Mailin before?

A. Yes.

Q. Did he come in with anybody on the prior occasion? A. No, sir.

Mr. Strong: May I have a minute to look through my notes? I may be finished. Also I am tired because one of my children had a nightmare last night and kept me up half the night.

(Testimony of Samuel J. Phoebus.)

The Court: You mean you are moving for a recess?

Mr. Strong: I would like to. I will just look through my notes and if I have no more questions then I will end with this witness and that will be a good place to stop, if your Honor doesn't mind.

The Court: Very well.

Mr. Strong: I guess that is all, your Honor.

The Court: Recess until 10:00 o'clock tomorrow morning. Tomorrow is Friday, and we will plan, if we do not finish tomorrow, to recess until the following Tuesday at 10:00 o'clock so you can make your plans over the weekend.

Recess until 10:00 o'clock tomorrow.

(Whereupon, at 4:00 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Friday, June 6, 1945.)

Los Angeles, California, Friday, June 6, 1947
10:00 A. M.

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Strong: No further questions.

Mr. Robnett: If the Court please, and counsel, I have just discovered an omission in the type-written transcripts and have checked it with the reporter's notes. The correction is on the top of page 917. The correction, as I understand it on that line

(Testimony of Samuel J. Phoebus.)

after the word "follows" should be: "The first \$24,000 of net profits would be shared equally between them." Then there is something to be added to that, and I am going to ask the reporter to look at his notes so that we can make the addition. I will ask him to read the entire answer.

The Court: Not the entire answer. It is a long answer.

The Reporter: After the words "as follows" it should read:

"The first \$24,000 of net profits would be shared equally between them. All amounts over, of legitimate net profits, would go to Ormont."

The Court: Very well.

Mr. Strong: I understand that is correct.

The Court: The motion to correct the transcript is granted. I have made the appropriate, and I hope legible notation on the Clerk's transcript, the [941] official transcript.

Mr. Robnett: Thank you.

SAMUEL J. PHOEBUS

the witness on the stand at the time of the adjournment, being previously duly sworn, resumed the stand and testified as follows:

Cross-Examination

By Mr. Robnett:

Q. Mr. Phoebus, as I understand from your testimony, you were employed by the United States Government in the Internal Revenue Department

(Testimony of Samuel J. Phoebus.)

thereof, up to July 1st, 1944, as what is known as a Deputy Collector?

The Court: 1945, was it not?

The Witness: 1945.

Mr. Robnett: Pardon me. 1945.

A. That is correct, yes, sir.

Q. How long had you been such Deputy Collector?

A. Since August 27, 1942.

Q. I don't know anything about the duties of the different officers. Maybe some of the jurors don't. Will you tell me what your duties were as Deputy Collector?

A. We call on taxpayers for delinquent taxes, by means of information which is obtained from the files of the Collector's office, and, to determine whether or not there were any delinquent taxes. I believe that fairly sums it up. There are other duties of the Collector's office which I was never [942] assigned to, where they collect taxes which have been assessed. That is, which have been recorded on the records as being due, but have not been paid. I was never assigned to that part of the Collector's duties, but that was part of the function of the Field Division of the entire office.

Q. As a Deputy, were you also, or did you have duties to make investigations concerning taxpayers' reports?

A. In the sense that every inquiry into the taxpayer's liability is an investigation, in that sense, yes, sir, I did.

(Testimony of Samuel J. Phoebus.)

Q. To the extent only of inquiring into the taxpayer's liability, is that right?

A. Yes, sir.

Q. You say that you received an assignment to make an investigation of Mr. Ormont's tax returns for 1944, is that correct?

A. Yes, sir.

Q. And from whom do you receive such assignments, or from whom did you receive this assignment?

A. My group chief in the Collector's office, Raymond Kirklichter.

Q. Without such assignment from your group chief you would not have been authorized to make any investigation, is that correct?

Mr. Strong: I object to that as calling for a conclusion.

The Court: It is preliminary. In other words, you don't [943] just reach in and grab a file and go out and choose your own work?

A. No, sir, not exactly. [944]

Q. (By Mr. Robnett): Was it your understanding that you would not or had no authority to make any investigation of Mr. Ormont's 1944 tax returns without a special assignment from your group chief?

A. It is not my understanding that I would need a special assignment.

Q. But you did have in this case, didn't you?

A. In this case I was assigned to investigate certain meat packers in the Vernon district.

Q. You weren't assigned then just to investigate this particular defendant?

(Testimony of Samuel J. Phoebus.)

A. He among others in a group.

Q. And that was, as you testified yesterday, that assignment was to investigate Mr. Ormont's returns for the calendar year 1944?

A. I am not sure but I believe in my testimony yesterday I used the phrase "to determine the correct income tax liability," but perhaps you are right.

Q. No, I understood your testimony, which is on page 896 of the transcript, line 14, you stated, "I had an assignment at that time to make an investigation of the income tax returns of Mr. Ormont and Mr. Himmelfarb for the year 1944."

A. That is correct.

Q. Now you went down and saw Mr. Ormont, you say, after that assignment? [945]

A. Yes, sir.

Q. And you told Mr. Ormont that you had been assigned to make an examination of his income tax returns at that time, didn't you?

A. Yes, sir.

Q. You didn't tell him that you were assigned to make an examination of his 1944 return only, did you?

A. I might have used the general phrase, "we want to determine whether or not you have paid all the taxes that are due." You see, that is the function of the collector's office, the deputy collector's office.

Q. But I want to know what you said to him. What do you say now that you said to Mr. Ormont when you saw him on May 18th?

(Testimony of Samuel J. Phoebus.)

A. I believe I told him that we wanted to determine if he had paid his proper taxes.

Q. You think that is the wording you used, do you? A. Yes, sir.

Q. By the way, you say that on the 1st of July you became a special agent?

A. Yes, sir; 1945.

Q. I should say 1945. A. Yes, sir.

Q. You assumed those duties on the 1st day of July, 1945? A. Yes, sir. [946]

Q. Was that assignment to that position a promotion or a demotion?

A. I considered it a promotion.

Q. Now as special agent, what were the duties assigned to you?

The Court: You mean what are the duties assigned generally to special agents?

Mr. Robnett: Well, perhaps that would be just as well.

The Court: Or to him specifically?

Q. (By Mr. Robnett): If there were any special duties assigned to you specifically, I would like to have you state them.

The Court: Here is the law on the subject, Section 3654, Title 26:

“Every Internal Revenue agent (I take it that includes special agents) shall see that all laws and regulations relating to the collection of Internal Revenue taxes are faithfully executed and complied with, and shall aid in the

(Testimony of Samuel J. Phoebus.)

prevention, detection and punishment of any frauds in relation thereto."

Incidentally, there is a similar power given to the collector by Section 3654 and like authority to deputy collectors. [947]

Mr. Robnett: I see. Thank you, your Honor.

Q. Now you testified yesterday concerning a conversation at which you were present in this building, and I believe it took place on the 24th day of May, 1945, is that correct. A. Yes, sir.

Q. Will you tell me all parties who were present at that conversation?

A. Mr. Ormont, Special Agent Bircher, Deputy Collector Schlick and myself. I was a deputy collector at that time.

Q. You were the only persons present, were you?

A. Yes, sir.

Q. That room was on what floor of this building?

A. The eighth floor.

Q. What size room was it?

A. I would say an area about the size of the jury box, the entire jury box.

Q. And it was an enclosed room, was it?

A. There is a door but the door was open.

Q. The door was open?

A. And there are two windows.

Q. Were they both open?

A. Both windows?

Q. I mean the door. I thought you said there were two doors. [948]

A. The door was open.

(Testimony of Samuel J. Phoebus.)

Q. Where did it open to, into another room or into a corridor?

A. Into a corridor, part of the suite of offices of the intelligence unit.

Q. Now prior to that had you not requested Mr. Ormont to come up there to that room?

A. Yes.

Q. And at the time you requested him to come up there, I will ask if he didn't ask you if it would be all right for him to bring his attorney?

A. I don't remember him having asked that question.

Q. Will you say he did not ask that?

A. No, I wouldn't say he did not ask it.

Q. I will ask you if at that time, after he had asked that question, if you didn't tell him that you wanted him to come alone?

A. That is definitely not true, sir.

Q. Did you tell him anything of the kind?

A. No, sir.

Q. Now in testifying to the conversation which you gave yesterday, did you give us all the conversation? A. No, sir.

Q. Will you give us the parts you omitted?

A. I omitted no part purposely, sir. [949]

Q. I didn't say you did purposely.

A. I omitted no part that I didn't remember. I attempted to repeat the conversation to the best of my recollection.

Q. As to all that you remember?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. But you are satisfied there were some parts that you didn't remember?

Mr. Strong: He didn't say that, your Honor.

The Court: He is asking him.

The Witness: Well, if you will give me a moment to think I might think of something that I did not say, I mean which I didn't say here yesterday but which I now remember.

Q. (By Mr. Robnett): I understood you a moment ago to say that you didn't give us all the conversation. I thought you had not remembered some of it.

A. I haven't got a photographic mind. I don't remember everything that was said there, no, sir, I don't. It wouldn't be fair to say that I did.

Q. Did you make any notes of the conversation yourself? A. Yes, sir.

Q. What? A. Yes, sir; I did. [950]

Q. And you retained those notes, did you?

A. Yes, sir.

Q. When did you make them?

A. Shortly after, a day after the incident occurred, and in the case of the interview there on May 24, 1945 I made them as the interview was going on.

Q. As it was going on?

A. Yes, because Mr. Ormont didn't want a stenographer present. We felt that we wanted a record.

Q. And you have prior to testifying here refreshed your memory from those notes?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. Did you refresh your memory yesterday before you went on the stand from them?

A. Not yesterday; no sir.

Q. What day did you?

A. The day before.

Q. Have you those notes with you?

A. No, sir.

Q. Where are they?

A. They are in the office.

Q. You left them?

A. I believe they are in the office.

Q. Now did you also, prior to testifying yesterday, go over that conversation with Mr. Bircher?

A. No, sir.

Q. At any time prior to coming on the witness stand.

A. Oh, yes, prior to coming on the witness stand.

The Court: But not yesterday?

The Witness: Not yesterday; no, sir.

Q. (By Mr. Robnett): How long prior to coming onto the stand? A. A month.

Q. You haven't gone over that conversation with Mr. Bircher within the last month then?

A. No, sir.

Q. Did you also go over that conversation with Mr. Schlick—was the other gentleman present, did you say? A. Yes, sir.

Q. Have you gone over that conversation with him? Yes, sir.

Q. How recently?

A. I would say about a month ago too.

(Testimony of Samuel J. Phoebus.)

Q. What was your reason for going over the conversation with those two gentlemen if you had notes on it?

The Court: If you had what?

Mr. Robnett: If you had notes of the conversations.

The Witness: More or less an exchange of ideas.

Q. (By Mr. Robnett): As to what had transpired? A. Yes, sir. [952]

Q. And some of the testimony you gave yesterday, was that based upon that exchange of ideas in that review of that conversation with those gentlemen? A. No, sir, I don't think so.

Q. You didn't gain anything at all from them on your discussions with them as to the conversation? A. I don't think so.

Q. Now at that conversation I will ask you if Mr. Ormond didn't tell you that, so far as he was concerned, he had nothing to hide in connection with his income tax reports, he thought they were all correct; did he make that statement or any statement of that sort to you?

A. Are you referring now to the interview on May 24, 1945?

Q. Yes.

A. I don't remember him making that statement; no, sir.

Q. Do you remember him making that statement to you or any similar statement?

A. No, sir.

Q. I will ask you also if on that 24th day of

(Testimony of Samuel J. Phoebus.)

May, 1945 at that conference if Mr. Ormont didn't tell you, and the other gentlemen present, that he wanted to cooperate in any way in connection with the matter at hand and if they found that he owed any taxes they would send him a bill for it, [953] show him where he owed it, and he would be very glad to pay?

A. Yes, I think he did say that; yes, sir.

Q. Do you know [954] of any bill ever being sent to him after that?

A. No, sir, I do not know of any bill.

Q. Now, in connection with the amount that you testified to yesterday that Mr. Ormont said he and Mr. Himmelfarb had received and divided, amounting to about \$35,000 apiece, I will ask you if Mr. Ormont didn't tell you that that money came from cattle brokerage deals?

A. No, sir.

Q. He did not make any such statement?

A. No, sir.

Q. Was that statement, or any similar statement, ever made to you by Mr. Ormont?

A. No, sir.

Q. Never mentioned?

A. No, sir.

Q. He did tell you, did he not, in that conversation, the first conversation you had, that ever since he and Mr. Salter had dissolved their partnership in 1943, I believe, that he, Mr. Ormont, had been the sole owner of the Acme Meat Company, and that he, as sole owner, was doing business under the fictitious name of Acme Meat Company?

(Testimony of Samuel J. Phoebus.)

A. On the occasion of May 24—do you want me to tell you what he said?

Q. No, I am just asking you if he didn't tell you that? [955]

A. Not on the occasion of May 24th, no sir.

Q. Did he at any time tell you that?

A. Yes. He inferred it. He replied, in response to a question,—he said: These transactions could have been from sources other than from customers of the Acme Meat Company.

The Court: I think you are talking about a different thing.

Mr. Robnett: I move to strike out the answer as clearly not responsive.

The Witness: I thought he asked me if there was any other occasion.

Mr. Strong: He said at any time.

The Court: The witness is talking about the last previous question counsel asked him.

The Witness: I am sorry, sir.

The Court: I think you had better read the question.

Mr. Robnett: I would like to have that stricken.

The Court: It may be stricken, and the jury instructed to disregard it. Will you read that, Mr. Reporter, the last question?

(Question read by the reporter.)

A. The answer to that question is yes.

Mr. Robnett: Thank you.

Q. Now, he also told you, did he not, that he

(Testimony of Samuel J. Phoebus.)

and Mr. [956] Himmelfarb were not co-partners in the Acme Meat Company?

A. His answer was evasive in this connection, and qualified.

Q. Just answer the question: Did he tell you, or did he not? A. No.

Mr. Strong: I submit that he can't answer it yes or no.

The Court: He has answered it. He said no.

Mr. Strong: Obviously his previous answer shows that "No" is not the full statement.

The Court: The witness has answered the question.

Q. (By Mr. Robnett): On the 24th of May, 1945, at the conference you have testified concerning, isn't it true that Mr. Ormont told you gentlemen at that time, so far as the Acme Meat Company was concerned——

The Court: Which one is this, May 24th?

Mr. Robnett: Yes—that the only position that Mr. Himmelfarb had with him, or with his company, the Acme Meat Company, was as an employee?

The Witness: Will you repeat the question?

(Question read by the reporter.)

A. That was qualified too. The answer to that is no.

Q. He did not tell you that? A. No. [957]

The Court: Did he convey that idea to you by language other than what counsel has used?

(Testimony of Samuel J. Phoebus.)

The Witness: I can explain. It won't be responsive to his question.

The Court: Do you want to explain it?

The Witness: I do want to explain it, yes.

The Court: Go ahead.

The Witness: He said that he preferred that the association be known as something other than a partnership, because of the jeopardy it would place him in so far as the slaughtering license, and so far as his subsidy to the R.F.C. was concerned, and for that reason they had established the relationship of Himmelfarb being an employee.

Q. (By Mr. Robnett): Did not he tell you, either in that conversation, or your first conversation with him, that Mr. Himmelfarb was paid a salary? A. Yes, sir.

Q. And didn't he tell you that he, Mr. Ormont, paid social security on Mr. Himmelfarb's salary?

A. I don't remember the question of social security being raised. It might have been.

Q. And did not he tell you that he also carried Mr. Himmelfarb under his unemployment insurance?

A. The same answer as before. I don't remember. It [958] might have been.

Q. At that first conference, did he not make available to you the records of the Acme Meat Company?

The Court: At that first conference? Which one do you call the first conference?

(Testimony of Samuel J. Phoebus.)

Mr. Robnett: The very first one. That was on the 18th, I believe.

The Court: That was when Mr. Phoebus visited him at his plant?

Mr. Robnett: Yes.

The Witness: I don't think he did, no, sir.

Q. Didn't he at one of your visits there?

A. Subsequently, yes, sir.

Q. Didn't he, before he ever came up here for the conference on the 24th?

A. I think he said his books and records were in the custody of the Defense Supply Corporation, and they were not on the premises at the time.

Q. Do you say that you did not see any of the books and records of the Acme Meat Company before the 24th of May, 1945, at which time you had a conference here in this building?

A. I did not say that.

Q. I say, will you say that?

A. No, I won't say that.

Q. You did see those books at one time, didn't you? [959] A. Yes, sir.

The Court: Did you see them before the 24th of May?

A. Yes, sir.

Q. (By Mr. Robnett): Did you note from those books that Mr. Himmelfarb was carried as an employee, and Social Security was paid, and income tax withholding was withheld from his salary?

Mr. Strong: I object to that. The books are the best evidence. This is hearsay.

(Testimony of Samuel J. Phoebus.)

The Court: Objection overruled.

A. I did not make a detailed examination of the books at that time, so I don't know when I saw the manner in which the books of the Acme Meat Company reflected the participation of Mr. Himmelfarb. I don't know whether it was when I saw them before the 24th, or subsequently.

Q. (By Mr. Robnett): It makes no difference to me when it was. You did find that that was true, did you not? A. Yes, sir.

Q. That the withholding tax was withheld from Mr. Himmelfarb's salary or income from the Acme Meat Company?

A. I don't remember having checked that particular part, the salary part of it. I do remember having seen the books and records, and that is borne out by the work papers that were prepared in my presence by Mr. Eustice. [960]

The Court: That is, the books and records reflected him as an employee?

The Witness: Yes, sir.

Q. (By Mr. Robnett): Is it not true that Mr. Ormont at the time you saw him on the 18th of May, 1945, and likewise, at the time you saw him on the 24th of May, 1945, told you that he would give you anything that you wanted in your investigation or examination?

A. He said so on the 24th.

Q. And subsequently he did, did he not, render the books and records available for your department?

(Testimony of Samuel J. Phoebus.)

A. There are two questions in there. Subsequently he did render the books and records of the Acme Meat Company for our inspection, yes.

Q. Isn't it true that at one of the times you were down to his place you looked over a number of invoices? A. Yes, sir, I did.

Q. And isn't it true that those invoices, when you received them, were in order, and that you, and whoever was with you, took them over to a table, or some place, and mixed them all up, and went away and left most of them, but took some with you? A. Yes, sir.

Q. It is true, is it not, that Mr. Ormont, on the 24th [961] day of May, 1945, at the conference where all these gentlemen were present——

A. May I correct my answer to that previous question? It is just a question of good housekeeping. We put the records back. We did not leave them all mixed up. We did take some with us, but we put the ones back in order which we left.

Q. You are sure of that now?

A. Yes, I am sure.

The Court: You put them back in order, but you don't know whether it was the right order?

The Witness: The order that I thought they were in, your Honor.

Q. (By Mr. Robnett): Now, Mr. Phoebus, I will ask you if, on the 24th day of May, 1945, at this conference where all of you gentlemen were present here in this building, that you testified concerning, if it isn't true that Mr. Ormont told you that any-

(Testimony of Samuel J. Phoebus.)

thing that was paid to Mr. Himmelfarb by the Acme Meat Company was paid to him as compensation for his services, or words to that effect?

A. No, I can't remember that.

Q. You can't remember that? A. No.

Q. You won't say he didn't say that?

A. That is right, I won't say he didn't say it.

Q. Now didn't he tell you that he had employed Mr. Himmelfarb to work for him at the Acme Meat Company plant and that he was paying Mr. Himmelfarb on a percentage basis of net profits?

A. I testified yesterday to the effect that the first \$12,000 of net profits would go to Mr. Himmelfarb and the—I will have to reframe that.

The first \$24,000 of legitimate net profits of the Acme Meat Company would be divided equally between him and Mr. Himmelfarb, and that all amounts over that would go to Ormont.

Q. Did he use the same words you have used? Are you attempting to use his language?

A. He didn't use those exact words; no.

Q. He didn't use the word "legitimate" at all, did he?

A. He did use the word "legitimate"; yes, sir.

Q. You are sure of that? A. Positive.

Q. Isn't it a fact that he told you that the profits of the Acme Meat Company would be divided as you have testified, \$25,000 would be divided between them and anything over that Mr. Ormont would get?

(Testimony of Samuel J. Phoebus.)

A. Are you still talking to the word “legitimate?”

Q. I am omitting it in this question and asking you if [963] he didn’t say it without the word “legitimate.”

A. No, sir.

Q. He never did?

A. I don’t believe he did. The phrase was used several times and he might have used it one time and another. The phrase with the use of the word “legitimate” in it is the one that impressed me.

Q. I know, but did he use that phrase or someone else in that conference use it?

Mr. Strong: That has been asked and answered, your Honor.

The Court: Objection overruled.

The Witness: He used the phrase.

Q. (By Mr. Robnett): Did anyone else in that conference use that phrase with the word “legitimate?”

A. Yes, sir, I think after he used it we kept using it.

Q. Not before he used it?

A. This chronology—I don’t know, I can’t answer that question honestly—I don’t know whether after the phrase was first used whether it was used subsequently by us. I remember that it was used subsequently by us and by him, but I have a definite recollection that he was the first to use it.

Q. You do have that? [964]

A. Yes, sir.

Q. Did you mention it in your notes?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. Would you get those notes?

A. Could I get them?

Q. Yes, could you get them?

A. I guess I could; yes, sir.

Q. When could you have them here?

A. I guess I could have them here after recess.

The Court: Your office is upstairs, is it?

The Witness: Yes, sir.

Q. (By Mr. Robnett): Will you do so, please?

A. Yes, sir.

Q. Now didn't he tell you that as an entirely side issue from the Acme Meat Company that on the 1st of May, 1944, he and Mr. Himmelfarb entered into a joint venture? A. Yes, sir.

Q. And he told you that the money, the \$35,000 plus, that he had received was received through that joint venture? A. Yes.

Q. And he likewise told you, did he not, that they, having entered into that joint venture on May 1, 1944, that they decided to and were using a fiscal year for accounting for income? [965]

A. He told me that they had that day filed a return on that basis.

Q. Yes. You subsequently found that they had filed such a return, didn't you? A. Yes, sir.

Q. And that is Exhibit 6? You have seen that here?

A. I saw the original return; I didn't see the exhibit.

The Court: There was part of the question that the witness didn't answer, I believe.

(Testimony of Samuel J. Phoebus.)

(The record referred to was read by the reporter as set forth above.)

The Court: I don't think you answered the question, did he tell you that they had decided to use a fiscal year because they had started in business on May 1st?

The Witness: No.

Q. (By Mr. Robnett): Did he say anything of that sort to you? A. Yes.

Q. What did he say to you?

A. He said they decided to report their income on a fiscal year basis.

Q. That is, as to the joint venture?

A. As to the joint venture.

Q. And on the 24th he told you that they had filed such a return? [966]

A. All the conversations about the fiscal year and the joint venture took place on the 24th.

Q. All right. He told you at all times, did he not, that the joint venture income was in no way entered on the books of the Acme Meat Company?

A. He told us that the gross and the net income were the same and that was put on the joint venture return.

The Court: That doesn't answer the question.

Mr. Robnett: Read the question.

(The question referred to was read by the reporter as set forth above.)

The Witness: To answer that I have to tell you what he said.

(Testimony of Samuel J. Phoebus.)

Q. (By Mr. Robnett): Did he say this or didn't he?

A. No. The answer is no.

Mr. Strong: May we have the explanation of what he said, your Honor, just to keep it in proper order?

Mr. Robnett: I am not asking for what he said.

The Court: I do not think so.

Q. (By Mr. Robnett): When you asked him the total amount of income from this joint venture, he at that time produced a piece of paper with some figures on it, did he not?

A. Yes, sir. [967]

Q. And that is the piece of paper that you have testified concerning and which you say Mr. Bicher took some memorandum from?

A. He took a sample copy of the page and wrote down the amounts as shown on Ormont's page from the same book.

The Court: Pardon me. By the way, did he tell you what this joint venture was?

The Witness: You mean the business that it was engaged in?

The Court: Yes.

The Witness: Yes, sir.

The Court: What was it?

The Witness: He said that they were collecting overcharges from customers of the Acme Meat Company.

The Court: That was the joint venture?

The Witness: Yes, sir.

Q. (By Mr. Robnett): He told you, did he not,

(Testimony of Samuel J. Phoebus.)

that he didn't do any collecting of any of the joint venture money? A. No.

Q. He didn't tell you that? A. No.

Q. He told you that he collected very little of it, if any? A. No. [968]

Q. He didn't tell you that?

A. Not in those words; no.

The Court: Did he convey that idea to you?

The Witness: He said most of it was collected by Himmelfarb because he was away.

Q. (By Mr. Robnett): Did he tell you the total amount that he said was taken in from the joint venture for the fiscal year beginning May 1, 1944, and ending April 30, 1945? A. Yes.

Q. He gave you that amount, didn't he?

A. Yes, sir.

Q. And he told you that was the amount they had filed the joint venture fiscal year return upon?

A. Yes, sir.

Q. You had an opportunity when you were examining the books of the Acme Meat Company to ascertain the names and addresses of the customers of the Acme Meat Company, didn't you?

A. Yes, sir.

Q. Therefore from and after the 24th day of May, 1945, you at all times knew the amount that Mr. Ormont said had been collected as a result of the joint venture?

A. Yes, I knew the rough figure. I didn't know the exact amount. It went down to cents.

(Testimony of Samuel J. Phoebus.)

Q. You didn't put the amount down in your notes? [969]

A. I didn't; no.

Q. You did have access to the joint venture return, the original of Exhibit 6 here in this case?

A. Yes.

Q. At all times thereafter, didn't you?

A. No.

Q. What was that?

A. I didn't have access to it, no. I could have seen it but I didn't have it available to see.

Q. I mean, you in your position had a perfect right to go in and look at it at any time you wanted?

A. Yes, sir.

Q. And isn't it true that that sets forth as his income from that joint venture the exact amount he, on that day, the 24th of May 1945, told you gentlemen was his income from that source?

A. I believe that is the exact amount; yes, sir.

Q. That sum is \$35,000—what is it?

A. \$694.42.

Q. Yes.

During the subsequent course of your investigation you found from the records of the Internal Revenue Department, did you not, that Mr. Ormont paid the tax in accordance with that \$35,000 and some reported there?

A. I found that on September 15th he made his estimate [970] consistent with his plan to file this income on a fiscal year basis.

The Court: You mean September 15, 1944?

(Testimony of Samuel J. Phoebus.)

The Witness: 1945.

The Court: This was filed in 1945, wasn't it?

The Witness: Yes, sir.

Mr. Robnett: That is correct. It is a fiscal year report.

The Court: Did he pay it? That was his question, did he pay the tax?

The Witness: He paid a small amount of tax in March, March 15th, in accordance with the requirements of filing an estimate, and then he paid another small amount in June and then it was less than a thousand dollars on each occasion, and then on September 15th he paid in excess of \$17,000. That is several months after we had started our investigation.

The Court: But he still wants to know, did he pay the tax in conformity with that return.

The Witness: Yes, he did; yes, sir.

Q. (By Mr. Robnett): I will ask you on what you call these estimates of income that are filed by businessmen, isn't it usual to show estimates small at the beginning because the man cannot tell what he will have and then increase it as he goes along?

Mr. Strong: That is speculative, your Honor. It is too [971] general.

The Court: Objection overruled.

The Witness: No, I wouldn't say that it was usual. Most accountants that I talk to say they——

Mr. Robnett: Just a moment.

The Court: If that question is directed to an explanation of the witness' answer which he had

(Testimony of Samuel J. Phoebus.)

given to the previous question, other than the answer which he said yes, he paid it, the last previous answer should be stricken because it was not responsive to your question.

Mr. Robnett: I move to strike it then, your Honor.

The Court: That is the answer where on a certain date he paid a small amount and in September he paid more.

Mr. Robnett: I move to strike it.

The Court: It may be stricken and the jury instructed to disregard it.

Mr. Strong: Except that it is stipulated and it is in evidence.

The Court: But it isn't part of his answer to this question.

Mr. Strong: All right.

Q. (By Mr. Robnett): Now let us go to the Acme Meat Company. Mr. Ormont told you, did he not, that the Acme Meat Company, which was Sam Ormont doing business as Acme Meat Company, owned an indebtedness [972] of some \$6500 to his mother for money he had borrowed from her?

A. Yes.

Mr. Robnett: That is all. Thank you.

Mr. Strong: Since it is 11:00 o'clock, I wonder whether counsel wishes to have the document brought down.

Mr. Robnett: Yes, I would like to have his notes when he gets them.

The Court: Mr. Katz, do you have any questions?

(Testimony of Samuel J. Phoebus.)

Mr. Katz: No, your Honor. It is my understanding that the testimony of this witness was all subject to the original ruling.

The Court: That is right.

Mr. Strong: I would like to state that I intend to make a motion to apply all the testimony to Mr. Himmelfarb.

The Court: I understand that.

Mr. Strong: I am making that statement because the witness is here for cross examination.

The Court: We will have a short recess. Remember the admonition.

(Short recess). [973]

The Court: The usual stipulation?

Mr. Strong: Yes.

Mr. Robnett: So stipulated.

Mr. Strong: I would like the record to show that we have turned over the notes to defendant's counsel.

The Court: The notes referred to in the witness' testimony this morning?

Mr. Strong: Yes.

Mr. Robnett: The notes that were taken the 24th day of May, 1945, by this witness. Mr. Strong has agreed to stipulate that nowhere in these notes of the witness, of the conference of May 24, 1945, does the word "legitimate" appear, excepting in connection with the matter of loans by the defendant's mother, where it says: Loans from mother, \$15,000, only \$6,500 legitimate. That is the only place it appears, is that correct, Mr. Strong?

(Testimony of Samuel J. Phoebus.)

Mr. Strong: So stipulated.

Mr. Robnett: There is one other question that I did want to ask the witness.

Q. Mr. Phoebus, is it not true that the defendant Sam Ormont——

The Court: Pardon me. In addition to those notes, did you make a written report?

The Witness: As Deputy Collector, yes, sir, I did.

The Court: Did you have recourse to that written report [974] before you came on the witness stand, for the purpose of refreshing your recollection?

The Witness: No.

Mr. Robnett: He answered no?

The Court: His answer was no.

The Witness: No.

Q. (By Mr. Robnett): You testified about going to the safe deposit box at Brooklyn and Cummings, Los Angeles? A. Yes, sir.

Q. At which box there were some bonds examined, is that correct? A. Yes, sir.

Q. Did you ascertain in whose name or names that box stood? A. Yes, sir.

Q. Whose?

A. It stood in the name of Sam Ormont and, I believe, his sister.

Q. Sue Kosdon? A. Sue Kosdon, yes, sir.

Q. But you do know that it stood in two names?

A. Two names, yes.

Q. And you believe that the other person was his sister?

(Testimony of Samuel J. Phoebus.)

A. I believe he said that was his sister. [975]

Mr. Robnett: That is all. Thank you. I return these to Mr. Strong.

The Court: Any redirect?

Mr. Strong: Yes, your Honor.

Redirect Examination

By Mr. Strong:

Q. These notes that we have just been talking about, which you said you made at about that conversation, do they contain a verbatim transcript of everything that was said? A. No, sir.

Q. And regardless of the notes did the defendant, Sam Ormont, use the word "legitimate" in his conversation with reference to that portion of his income, as you have testified?

Mr. Robnett: I object to that as not redirect, if the Court please.

The Court: Objection sustained.

Q. (By Mr. Strong): In connection with the questions as to whether the books and records of the Acme Meat Company which you examined show that money was paid to Phillip Himmelfarb as salary, you testified that you examined those books and records, is that not true? A. Yes, sir.

Q. And I now show you Government's Exhibit 40-B, for identification, and ask you whether this exhibit contains the [976] figures and other writings on that page which you examined?

Mr. Katz: If the Court please, if this is still under and pursuant to the understanding that an

(Testimony of Samuel J. Phoebus.)

objection is interposed, and that it only relates to Sam Ormont, I have nothing to say. On the other hand, if this is a departure, and counsel intends to proceed against the defendant Himmelfarb, I would like to make an objection.

The Court: Are you objecting?

Mr. Katz: Yes, I am objecting upon the ground that it is incompetent, irrelevant and immaterial. There is no foundation laid for it. It is hearsay against the defendant Himmelfarb. It is not the best evidence.

Mr. Robnett: I join in the same objection as to Mr. Ormont. It is incompetent, irrelevant and immaterial, and not the best evidence. The books themselves are the best evidence, and it is asking the opinion of the witness. No foundation has been laid.

Mr. Strong: The books are the best evidence.

The Court: As to the defendant Himmelfarb, the objection will be sustained. As to the defendant Ormont, the objection will be sustained on the ground that no foundation has been laid.

Q. (By Mr. Strong): Did you examine all of the books and records with reference to the matter which you testified to, the salary matter of Himmelfarb, as shown by the books and records? [977]

Mr. Katz: Same objection, if the Court please.

The Court: Same ruling.

Mr. Robnett: I object to that as asking the opinion of the witness, as to whether he examined all the records.

(Testimony of Samuel J. Phoebus.)

The Court: Objection sustained.

Q. (By Mr. Strong): What records did you examine?

Mr. Katz: Same objection, if the Court please.

The Court: Same ruling as to Himmelfarb.

The Witness: I examined the journals and the general ledger.

Q. (By Mr. Strong): And did you examine a page which showed, as you testified on cross examination, the money paid as salary to Phillip Himmelfarb?

Mr. Katz: Same objection, if the Court please.

Mr. Robnett: Objected to upon the ground that it is leading and suggestive, and asking for the conclusion of the witness. The books would be the best evidence, and the page thereof would be the best evidence of its contents.

Mr. Strong: That was my objection when the cross-examination was going on, and I was overruled.

The Court: You were overruled, and correctly so.

Mr. Strong: I am not objecting to the overruling. I just am pointing it out. [978]

The Court: There is no duty upon the defendant here to produce his books and records.

Mr. Strong: I don't say that there is.

The Court: As to the defendant Himmelfarb, the objection to the immediate question is sustained. As to the defendant Ormont, the objection will be sustained only on the ground that no foundation has been laid. And in making my ruling I am taking

(Testimony of Samuel J. Phoebus.)

into consideration the fact that there has been laid before the witness Exhibit 40-B.

Mr. Strong: Yes.

The Court: To which reference was made in the course of asking counsel's question. [979]

Mr. Strong: I will remove from the witness Exhibit 40-B. Will that remove it from his mind?

The Court: I am afraid not.

Mr. Strong: Then I won't ask any further questions on Exhibit 40-B.

Q. You were asked concerning some invoices which you said you took. I will now show you invoices in evidence which are marked Government's Exhibits 38 and 39 and ask you if you took any one of these invoices.

Mr. Katz: If the Court please, I presume now we are reverting back to where the understanding is that the objection has been made and the same ruling with respect to further questions asked by Mr. Strong.

Mr. Strong: At the present time I am not applying it to the defendant Himmelfarb.

The Court: Very well.

Mr. Katz: He tells me when he is not but I can never tell when he is.

The Court: He is not except when he says he is.

Mr. Strong: That is right, your Honor.

Mr. Robnett: I object to the question on the ground that it has already been testified to by the witness.

The Court: That is not a valid objection.

(Testimony of Samuel J. Phoebus.)

The Witness: The answer is no.

The Court: That is to say, those are none of the invoices [980] or papers which you took?

The Witness: That is correct; those are none.

The Court: Where are the ones you took? Were they ever returned to Mr. Ormont or the Acme Meat Company, or do you know?

The Witness: I have them.

The Court: You still have them?

The Witness: Yes, sir.

The Court: They have not been returned?

The Witness: That is right. My reason for not returning—no. You just have them.

Q. (By Mr. Strong): Now you testified that during the conversation the defendant Ormont told you that he was the sole owner and doing business as Acme Meat Company. Did the defendant Ormont during that same conversation tell you anything else about he was the owner?

Mr. Robnett: I object to that as having been gone into on direct, and it is not redirect examination. He asked him for the conversation yesterday and he gave it.

Mr. Strong: It was limited on the question on cross-examination to one phase of the conversation.

Mr. Robnett: I had a right to ask him certain things that were in it.

The Court: I think counsel is right. The objection is [981] sustained. The matter was gone into on direct.

Q. (By Mr. Strong): Now in connection with

(Testimony of Samuel J. Phoebus.)

the discussion at which you said the word "legitimate income" was used, was there any discussion as to any other income?

Mr. Robnett: I object to that as having been gone into on direct and it is not redirect examination.

Mr. Strong: It is part of the cross-examination, your Honor.

The Court: I know, but it was not new matter.

Mr. Strong: I did not understand that I am limited to new matter at this point.

The Court: Yes.

Mr. Strong: To matter brought out on cross?

The Court: New matter brought out on cross.

Mr. Strong: If that is your Honor's ruling I will then confine my questions to that.

The Court: The objection is sustained.

So that the jury will have some idea, the rule is on redirect examination of a witness by a party producing him, on redirect examination he can only ask questions concerning new matter developed on cross-examination, so if it has been covered in the direct once that is the only chance he has at it. [982]

Q. (By Mr. Strong): You were asked whether you had access to the names of the customers from whom Mr. Ormont said he had received this additional income.

Mr. Robnett: I submit that that is not a statement of the facts. He was not asked that on cross-examination; he was asked if he had access to the

(Testimony of Samuel J. Phoebus.)

customers of the Acme Meat Company. That is all he was asked.

The Court: In substance Mr. Strong has stated the testimony as I understood it. The objection is overruled.

Q. (By Mr. Strong): Did you?

A. You merely stated that I was asked that.

The Court: He hasn't asked a question yet.

Q. (By Mr. Strong): Did you have access to the names of customers who paid any of these additional sums?

Mr. Robnett: I object to that as asking for an opinion of the witness and not redirect examination.

The Court: It calls for the opinion and conclusion of the witness. The objection is sustained.

Q. (By Mr. Strong): As to the additional sums which you testified Mr. Ormont said he collected as part of the joint venture, what books or records were made available to you by Mr. Ormont? [983]

Mr. Robnett: I object to that as not redirect examination; incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: He said that there were no books and records, only the slip of paper which he had showing the amounts that had been received from this source.

The Court: By the way, when you were at the Acme Meat Company, did you have access to the books and records giving the names of their customers?

The Witness: Yes.

(Testimony of Samuel J. Phoebus.)

The Court: Obviously. You had the invoices of course.

The Witness: Yes.

Q. (By Mr. Strong): That is the books and records with reference to the amounts and customers shown on the books of the Acme Meat Company, is that right?

A. I didn't understand you.

Q. The list of customers was with reference to those records?

A. To the regular business of the Acme Meat Company.

Mr. Strong: That is all.

Mr. Robnett: That is all.

The Court: Mr. Katz, do you have any cross-examination?

Mr. Katz: No, your Honor.

The Court: Very well. You may step down.

(Witness excused.)

The Court: Next witness.

Mr. Strong: Mr. Malin.

WILLIAM S. MALIN

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: William S. Malin.

The Clerk: How do you spell your last name?

The Witness: M-a-l-i-n.

(Testimony of William S. Malin.)

The Clerk: Your address?

The Witness: My business address is 639 South Spring Street.

The Clerk: Take the stand.

Direct Examination

By Mr. Strong:

Q. Mr. Malin, what is your occupation?

A. I am a public accountant, sir.

Q. Certified?

A. Certified public accountant.

Q. How long have you been a certified public accountant? A. Since 1928.

Q. Where is your place of business?

A. 639 South Spring Street. [985]

Q. Do you maintain an office there?

A. Yes, sir.

Q. Were you during the month of May 1945 acting and pursuing your profession of certified public accountant? A. Yes, sir.

Q. At that address? A. Yes, sir.

Q. Did you at any time during the month of May 1945 meet with the defendant Sam Ormont?

Mr. Robnett: As to which, your Honor, I wish to interpose an objection, and the objection requires possibly a little evidence to sustain it. It is an objection on the ground that any facts or evidence this witness might testify to are privileged. I would like to have the privilege of asking a few questions of the witness before this question is ruled upon.

(Testimony of William S. Malin.)

The Court: Let me hear the particular question.

(The question referred to was read by the reporter as set forth above.)

The Court: If the answer is no, that is the end of it. The objection is overruled to that question. You may answer the question yes or no.

The Witness: Yes, sir.

Q. (By Mr. Strong): On what date did you first meet with the defendant [986] Sam Ormont?

A. May 21st is my best recollection.

Q. What year? A. 1945.

Q. Where did you meet with him?

A. At my office.

Q. Who was present?

A. Mr. Mirman, the defendant's attorney——

The Court: May when, the 21st?

The Witness: Yes.

Q. (By Mr. Strong): Anyone else?

A. No, sir.

Q. Was the defendant present?

A. Mr. Ormont was present.

Q. And you? A. Yes, sir.

Q. That is all? A. Yes, sir.

Q. Did you have any discussion on that date with reference to the income of the defendant Sam Ormont?

Mr. Katz: Objected to, if the Court please, in so far as the defendant Phillip Himmelfarb is concerned as hearsay then and not binding as to him. We ask that the same understanding be had, that

(Testimony of William S. Malin.)

the objection is interposed to each [987] question and the same ruling until such time as it develops he is proceeding against Mr. Himmelfarb.

The Court: The objection is sustained.

Mr. Robnett: I now wish to interpose an objection on the ground that any conference that was had with Mr. Ormont with this witness was privileged. I would like to have the privilege of taking the witness on voir dire.

The Court: You may proceed.

Voir Dire Examination

By Mr. Robnett:

Q. Mr. Malin, you were introduced to Mr. Ormont, were you not, by Mr. Mirman, whom you have mentioned? A. Yes, sir.

The Court: Just a moment now. You say that you are a certified public accountant?

The Witness: Yes, your Honor.

The Court: Certified and licensed under the laws of the state of California?

The Witness: Yes, sir.

The Court: To practice accountancy?

The Witness: Yes, sir.

The Court: Very well.

Q. (By Mr. Robnett): And is it not and was it not a fact at that time that Mr. Mirman was an attorney at law? [988]

Mr. Strong: I will stipulate that he was an attorney at law. I know Mr. Mirman.

The Court: He is and was at that time?

Mr. Strong: Yes, you Honor.

(Testimony of William S. Malin.)

Q. (By Mr. Robnett): I will ask you, Mr. Malin, isn't it a fact that Mr. Mirman was the attorney for Mr. Ormont at that time.

A. Yes, sir. [989]

Q. And isn't it a further fact that Mr. Mirman, as attorney for Mr. Ormont, engaged you in connection with matters that he was attending to as Mr. Ormont's attorney, in connection with income taxes?

The Witness: Will you repeat the question?

(Question read by the reporter.)

Mr. Strong: I object to that as calling for the conclusion of the witness. He can state what happened. What was said.

The Court: Sustained.

Mr. Robnett: What was the ruling, your Honor?

The Court: Objection sustained.

Q. (By Mr. Robnett): Mr. Malin, prior to the 21st day of May, 1945, particularly at the time you met Mr. Ormont, isn't it true that Mr. Mireman communicated with you, and told you that he wanted to have you help him work out some matters for Mr. Ormont, his client, in connection with income taxes?

A. Not prior to the 21st. That was on the same day?

Q. On the same day? A. Yes, sir.

Q. And he did, before you met Mr. Ormont, did he not? A. Yes, sir.

Q. And pursuant to that statement to you by

(Testimony of William S. Malin.)

Mr. Mirman, he came to your office, did he? [990]

A. Yes, sir.

Q. When he came, Mr. Ormont was with him?

A. Yes, sir.

Q. Is that correct? A. That's right.

Q. And it was Mr. Mirman then who engaged you, was it not?

Mr. Strong: I object to that upon the same ground, calling for the conclusion of the witness. He can say what was said.

The Court: Sustained.

Q. (By Mr. Robnett): Did you not, in connection with any work that you performed in that regard, take your directions from Mr. Mirman?

A. Yes.

Q. That is correct, is it not? A. Yes.

Mr. Robnett: I believe that is sufficient, your Honor, to show privileged communication, on the ground that any matter that was discussed with this gentleman was discussed in the presence of Mr. Ormont's attorney, and with this gentleman, and Mr. Mirman, Mr. Ormont's attorney, was employed similar to a secretary or assistant.

The Witness: Can I get an explanation of that question, your Honor? They are talking about direction. When it comes [991] to accounting and tax matters I don't take any direction; but when it comes to a specific request, I follow those instructions.

The Court: The directions that were given to you, I think would be the only thing. If anybody gave you directions, who gave them to you?

(Testimony of William S. Malin.)

The Witness: Mr. Mirman. But up to that time I had no directions.

The Court: But thereafter?

The Witness: Yes.

The Court: Did Mr. Mirman give you directions in connection with your work as a professional accountant?

The Witness: Yes, your Honor.

Mr. Strong: May I ask the witness some questions:

The Court: Yes.

Q. (By Mr. Strong): You were asked whether Mr. Mirman engaged you? Will you state what the conversations were with reference to your being retained? First state when they took place, and who was present.

A. On May 21 I received a telephone call from Mr. Mirman, stating he had a client in his office who was down town, and would like to see me on a tax matter. I was busy, but I told him to come on over, and he did.

Q. Who was present? [992]

Mr. Robnett: What was said after, after they got there is objected to as privileged.

The Court: Objection sustained.

Mr. Strong: As to retaining him; not anything else. There is no evidence here that he was retained as a clerk or secretary, or anything. That is what I want to bring out.

The Court: The evidence shows that at that time Mr. Mirman was the attorney for Sam Ormont.

(Testimony of William S. Malin.)

Mr. Strong: That's right.

The Court: But the directions received by this witness in connection with that matter were given to him by Mr. Mirman.

Mr. Strong: What directions, your Honor?

The Court: Whatever objections he received. That is his testimony.

Mr. Strong: Supposing he told him to go down the hall, as a sole direction.

The Court: Maybe he did, but that would be immaterial anyhow. So if he told him that, it would not be admissible. Excuse me just a moment, and I will see what Professor Wigmore has to say.

Mr. Strong: Also the Code of the State, your Honor, as to privilege.

The Court: "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of [993] professional employment; nor can an attorney's secretary, stenographer or clerk be examined." Wigmore extends the rule to attorney's clerks, and other agents. "The assistance of these agents being indispensable to his work, and the communications of his client being often necessarily committed to them by the attorney, or by the client himself, the privilege must include all the persons who act as the attorneys' agents."

Mr. Strong: There is no evidence that he acted as the attorney's agent, your Honor.

The Court: There were no other persons present

(Testimony of William S. Malin.)

during the period of this consultation except Mr. Ormont, Mr. Mirman and yourself?

The Witness: That is correct, your Honor.

Mr. Strong: May I be heard further?

The Court: Do you mean you want to ask some more questions?

Mr. Strong: Yes.

The Court: All right.

Q. (By Mr. Strong): Will you state what directions were given to you on this first occasion?

Mr. Robnett: I object to that, if the Court please, as asking for the conclusion of the witness, and as privileged.

Mr. Strong: It is cross-examination, your Honor. He asked about directions.

The Court: Objection sustained. [994]

Mr. Strong: No further questions.

The Court: The witness will be excused.

Mr. Strong: As to this phase of it.

Q. Did you ever meet with the defendant, Sam Ormont, in the presence of someone other than his attorney? A. Yes.

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial, if the Court please; because the matter was privileged to start with, it continued to be privileged.

Mr. Strong: It becomes unprivileged when an outsider comes in.

The Court: Not necessarily so. The objection to the question will be overruled. The answer will stand.

(Testimony of William S. Malin.)

Q. (By Mr. Strong): When was the first occasion when someone else was present besides Samuel Ormont and/or his attorney Mirman?

Mr. Robnett: Objected to as privileged, if the Court please, and as incompetent, irrelevant and immaterial.

The Court: It assumes that there was more than one occasion. Let me hear the question again, please.

Mr. Strong: I will rephrase it.

The Court: All right.

Q. (By Mr. Strong): When was the first occasion, if there was more than one, in which you had a conversation with the defendant when someone other than he and his attorney were present?

A. I believe it was May 22, the day after when——

The Court: No.

Q. (By Mr. Strong): Who was present?

A. Mr. Himmelfarb, Mr. Ormont, and the attorney Mirman.

Q. Where did this conversation take place?

A. At the attorney's house.

The Court: At the attorney's house?

The Witness: Yes, in the evening.

The Court: The attorney was present?

The Witness: Yes.

Q. (By Mr. Strong): Was there any discussion at that time with Ormont as to his income?

Mr. Robnett: I object to that, if the Court please, as privileged, incompetent, irrelevant and immaterial; because the other defendant was present would not change the rule, I don't believe, as to privilege.

(Testimony of William S. Malin.)

Mr. Strong: I don't think it has anything to do with it.

The Court: Not as to Sam Ormont. Objection overruled.

Mr. Katz: On behalf of the defendant Himmelfarb I object as incompetent, irrelevant and immaterial; no foundation laid; hearsay as to him.

The Court: Objection overruled. We will find out by [996] what the question is?

Mr. Katz: If the Court please, may I now examine the witness on voir dire with respect to employment and the relationship to Mr. Mirman of defendant Himmelfarb?

The Court: Yes.

Mr. Strong: We offer this only as to Ormont at this time, to save time.

The Court: It is offered only as to the defendant Ormont. It will be disregarded as to the defendant Himmelfarb?

Mr. Robnett: If the voir dire should develop that it was the same attorney, it would be privileged.

The Court: I think that is right. Go ahead on the voir dire then. [997]

Voir Dire Examination

By Mr. Robnett:

Q. Mr. Malin, I ask you if it isn't a fact that the time or about the time that Mr. Mirman communicated with you with regard to having a client whom he identified afterwards as Mr. Ormont, if he didn't also communicate with you and tell you that there were two clients, Mr. Ormont and Mr.

(Testimony of William S. Malin.)

Himmelfarb that he wanted to confer with you about.

Mr. Strong: Objected to on the ground it calls for a conclusion. He should give the statement of what was said by the attorney, your Honor.

The Court: Objection overruled.

The Witness: Can I have the question.

(The question referred to was read by the reporter, as set forth above.)

The Witness: He didn't say he had two clients; he said he represented both Ormont and Himmelfarb.

Q. (By Mr. Robnett): And he at a later date produced both Mr. Ormont and Mr. Himmelfarb at his home or his office?

A. At his home, for my convenience.

Q. And the two defendants and Mr. Mirman were present? A. Yes, sir.

Q. At that time that was the first time you had met Mr. Himmelfarb, was it? [998]

A. Yes, sir.

Q. Prior to that had Mr. Mirman told you that Mr. Himmelfarb was one of the parties that he wanted to confer with you about?

A. I don't think we had any conversations about that. I wanted to see Mr. Himmelfarb with Ormont and asked him if he could arrange it and he said yes, he represented—I don't know whether he used the word "represents"—but he said yes, he could arrange it.

Q. He did tell you, Mr. Mirman did tell you, did

(Testimony of William S. Malin.)

he not, at a time when he produced Mr. Himmelfarb that he represented both Mr. Ormont and Mr. Himmelfarb? A. Yes.

The Court: Did you thereafter perform any work in connection with the income accounting or such matters with relation to the defendant Himmelfarb?

The Witness: With relation to both of them.

The Court: With relation to both of them?

The Witness: Yes, sir.

The Court: From whom did you receive what directions you received in that connection?

The Witness: From Mr. Mirman.

The Court: From Mr. Mirman?

The Witness: Yes, sir.

Mr. Strong: May I object to that on the ground that [999] it doesn't state what the directions were and that the directions had nothing to do with the subject matter.

The Court: I think under such a circumstance as this there would be no need of having the rule of privilege if you could compel a witness to testify to what the conversation was. The objection is overruled. That is, Mr. Strong's objection.

You were examining on voir dire, Mr. Robnett.

Mr. Strong: May I ask a question on voir dire?

The Court: Yes.

Q. (By Mr. Strong): From whom did you receive a fee in this case?

Mr. Robnett: Objected to as incompetent, ir-

(Testimony of William S. Malin.)

relevant and immaterial, if the Court please. This matter is still privileged.

The Court: Objection sustained.

Mr. Strong: No further questions on voir dire.

Direct Examination

(Continued)

By Mr. Strong:

Q. Was there any occasion when you had a conversation with the defendant Sam Ormont with or without his attorney being present and with or without Mr. Himmelfarb being present when there was still another person present?

A. Well, no—does the time make any difference?

Q. Just answer yes or no.

The Court: He wants to know if there was ever any time. [1000]

The Witness: Mr. Bircher was present.

Q. (By Mr. Strong): When?

A. When they were conducting their examination.

Q. Where did that conversation take place?

A. I believe one was in South Gate at the plant.

Q. Who was present at that conversation?

A. Mr. Ormont, Mr. Bircher and Mr. Phoebus. I am not too sure whether Mr. Bircher was present the second time. There was a Mr. Phoebus and a Mr. Schlick. They probably can refresh my memory.

Q. No, just your own memory as to who was present.

(Testimony of William S. Malin.)

A. I believe Mr. Bircher and Mr. Phoebus were there.

Q. What was the date of this conversation?

A. That would be awfully hard for me to remember. It was some time during their examination, maybe in June.

Q. What year? A. 1945.

Q. Where did the conversation take place?

A. In the plant at South Gate.

Q. Whose plant?

A. The Acme Meat Company.

Q. Did you have any conversations with the defendant Ormont at any other time when anybody else besides Mr. Ormont or his attorney or Mr. Himmelfarb was present? [1001]

A. When anybody else was present?

Q. Yes, somebody else besides them.

A. I don't recall of any.

Q. I show you Government's Exhibit 42 for identification and ask you if that is in your handwriting.

A. Yes, sir. The first page is.

Q. Will you look at the others?

A. Yes, sir, these are all in my handwriting.

Q. Did you prepare that list?

A. Yes, I did.

Q. Where did you prepare it?

A. At the bank on Soto and Brooklyn Avenue.

Q. What is that a list of?

A. That is a list of contents of a safe deposit box.

(Testimony of William S. Malin.)

Q. Who was present, if anyone?

A. Mr. Bircher, Mr. Phoebus, I believe Mr. Schlick was present, and Mr. Ormont.

Q. Whose box was it?

A. Mr. Ormont's box.

Q. What did you list on Government's Exhibit 42 for identification?

A. I listed——

Mr. Robnett: I object to this as incompetent, irrelevant and immaterial, that the bonds and the contents of the box would be the best evidence, and it is a conclusion of the [1002] witness as to what is listed. Also it is privileged.

The Court: The question of privilege, the objection on the ground or privilege is overruled. On the other ground, the defendant Ormont was present, you say, when you made that list?

The Witness: I believe he was. We couldn't get into the box without him.

The Court: The objection is overruled.

Mr. Strong: May we have the question read?

(The question referred to was read by the reporter, as follows:

("Q. What did you list on Government's Exhibit 42 for identification?")

The Witness: Is it all right to answer?

Q. (By Mr. Strong): What was it?

A. A list of the bonds, savings and war bonds in the box, in that safe deposit box.

Mr. Strong: I offer Government's Exhibit 42 for identification in evidence.

Mr. Robnett: To which I object, if the Court

(Testimony of William S. Malin.)

please, on the ground it is incompetent, irrelevant and immaterial, not the best evidence, no proper foundation has been laid. The contents of the bonds themselves would be the best evidence. And this exhibit shows on its face that there are other [1003] people interested in those bonds that are listed there on that exhibit and there is no evidence in this case to show that they were all or any of them were Mr. Ormont's bonds.

The Court: The objection is overruled. Exhibit 42 is admitted in evidence.

Mr. Katz: As against the defendant Ormont only?

The Court: As against the defendant Ormont only.

(The document referred to was received in evidence and marked Government's Exhibit No. 42.)

Mr. Strong: May we at this time recess for lunch?

The Court: Motion granted. Recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m., of the same date.)

Los Angeles, California, Friday, June 6, 1947

2:00 P.M.

The Court: The usual stipulation?

Mr. Strong: The usual stipulation.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

Mr. Strong: May I have these marked for identification, your Honor?

The Court: 50?

The Clerk: That's right, your Honor.

Mr. Strong: May I separate these pages, your Honor?

The Court: You have marked several pages differently now?

Mr. Strong: Yes, your Honor. I will read off how they are marked. 50 for identification is a series of four pages, the first one having the first item, "Phillip Himmelfarb" on the top of it.

The Court: The other is of another batch?

Mr. Strong: Another batch, and it says: "Sam Ormont."

The Court: We will call that 51.

Mr. Strong: And the envelope is 52.

The Court: 52.

(The documents referred to were marked Government's Exhibits 50, 51 and 52 for identification.)

WILLIAM S. MALIN

the witness on the stand at the time of the adjournment, being previously duly sworn, resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Strong:

Q. I show you Government's Exhibits 50, 51 and 52 for [1008] identification, and ask you if you ever saw those before.

A. Yes, they are very familiar. That's 50. This looks familiar, Mr. Strong.

Q. I show you Government's Exhibit 52 for identification. Did you have this envelope prepared, or did you prepare it?

A. That is my envelope.

Q. Did you mail it, as shown, to Mr. Donald Bircher?

A. I imagine I did, Mr. Strong.

Q. I want to know whether you did or did not?

A. Yes. It is my envelope.

Q. What was contained in that envelope?

A. I don't know. Probably one of these.

Mr. Katz: I object to one of these, as a conclusion of the witness. He stated he did not know.

Q. (By Mr. Strong): I show you Government's Exhibit 50? Did you ever send this to Mr. Bircher?

Mr. Katz: Objected to upon the ground that it is incompetent, irrelevant and immaterial; no foundation laid; it does not come within the confines or encompass the privilege rule; no corpus delicti

(Testimony of William S. Malin)

established as against the defendants, and it has no bearing on any of the issues of the case.

Mr. Robnett: I object on behalf of Mr. Ormont as hearsay evidence, incompetent, irrelevant and immaterial [1009]

The Court: Let me see it.

Mr. Strong: Show it to the Judge.

The Court: Have you finished looking at it?

The Witness: Yes.

The Court: Your question is: Did you ever send this?

Mr. Strong: Both 50 and 51.

The Court: To Mr. Bircher?

Mr. Strong: Yes.

The Court: The objection on behalf of the defendant Himmelfarb,—will you state that again?

Mr. Katz: I object upon the ground, if the Court please, that no foundation has been laid; it is incompetent, irrelevant and immaterial; no corpus delicti established; not within the issues of this case, and a privilege encompassed within and defined by the privilege rule.

The Court: And the Ormont objection?

Mr. Robnett: Your Honor, do I understand there are two exhibits offered, 50 and 51?

The Court: Yes.

Mr. Robnett: As to 50, I object upon the ground that it is hearsay as to Mr. Ormont; incompetent, irrelevant and immaterial; a privileged communication; and as to 51, that that is a privileged communication, and we claim the privilege. And it is

(Testimony of William S. Malin)

incompetent, irrelevant and immaterial, and further that as to 51, pages 1 and 2 are especially privileged, and probably [1010] the last page. These three pages are privileged as to Mr. Ormont, and I want to make a separate objection upon the ground of privilege as to each part of that exhibit on pages 1, 2, 3 and 4.

Mr. Katz: I did not understand the question was directed to Exhibit 51 as well as 50. If it is, I object to it.

The Court: You are offering both, Mr. Strong?

Mr. Strong: Yes.

Mr. Katz: And as to 51, I object upon the ground that it is hearsay as to the defendant Himmelfarb.

The Court: The objection as to 50, so far as the defendant Ormont is concerned, is sustained upon that ground that it is hearsay; and the objection as to 51 as to the defendant Himmelfarb is sustained upon the ground that it is hearsay. Otherwise the objections are overruled. In other words, the question: "Did you ever send these to Mr. Bircher" as to 50 is admissible if the witness answers yes, as against Himmelfarb, and as to 51 it is admissible as against Ormont.

Q. (By Mr. Strong): What is your answer as to whether you sent these to Mr. Bircher?

A. I know that I had sent statements to Mr. Bircher. The balance sheets——

Q. Look at these, and see if you sent these to Mr. Bircher. [1011]

Mr. Katz: I move to strike the answer of the witness as to the defendant Himmelfarb.

(Testimony of William S. Malin)

Mr. Robnett: I join in the motion.

The Court: The motion is granted. The question, however, remains: Look at these, and see if you sent these to Mr. Bircher.

Mr. Katz: As they are there?

Mr. Strong: Yes.

The Witness: Mr. Strong, can I take these separately? I am a little confused here. [1012]

Mr. Strong: Well, take your time and take them separately.

The Witness: I know the balance sheet, I prepared that from information that they gave me.

Mr. Strong: Which is the balance sheet?

The Court: If you maintain they were sent to Bircher why do you not put him on the stand? Go ahead.

Mr. Katz: If the Court please, with respect to this voluntary statement of the witness as to what he prepared, we move to strike that as not responsive.

Mr. Robnett: I join in that motion.

The Court: I didn't know he had said anything. He asked if he could take them apart.

Mr. Robnett: He did make some statement.

The Court: The jury is instructed to disregard it if they heard it.

Mr. Strong: What did he say? I didn't hear it.

The Court: Whatever it is, it is stricken.

Now you are taking apart Exhibit 50?

Mr. Strong: Yes. I would like to have these marked 50-A, B, C, and D.

The Court: Very well.

(Testimony of William S. Malin)

(The documents referred to were marked Government's Exhibits Nos. 50-A, 50-B, 50-C and 50-D for identification.)

Mr. Strong: May I have the same thing done with 51, to [1013] make it 51-A, B, C and D?

The Court: So ordered.

(The documents referred to were marked Government's Exhibits Nos. 51-A, 51-B, 51-C and 51-D for identification.)

Mr. Katz: May it please the Court, in order that the objections heretofore interposed to the questions with respect to Exhibit 50 for identification, I would like to interpose them to 50-A, B, C and D as now constituted.

Mr. Robnett: The same would be true of our objections, your Honor.

The Court: It will be so understood. The objections are overruled.

Q. (By Mr. Strong): I show you Government's Exhibits 50-A and 50-B for identification. Did you send those to Mr. Bircher?

A. I believe I did.

Q. And that signature on 50-B, did you see that put on there? A. Yes, sir.

Q. Who wrote it there?

A. Mr. Himmelfarb.

Q. The defendant Himmelfarb?

A. Yes, sir.

Q. I show you Government's Exhibits 51-A and 51-B, and ask you if you sent those to Mr. Bircher.

A. I believe I did.

(Testimony of William S. Malin)

Q. And the signature on 51-A, did you see that put on there? A. I believe I did.

Q. Did you or didn't you?

A. I think I did.

Q. Who wrote it? A. Mr. Ormont.

Mr. Robnett: Move to strike the answer, your Honor.

The Court: The answer may be stricken.

Q. (By Mr. Strong): Did you see it or didn't you, Mr. Witness?

A. It is awfully hard to remember. I would say yes.

The Court: You mean that is your best recollection?

The Witness: That is my best recollection, your Honor.

The Court: Who wrote it?

The Witness: Mr. Ormont.

The Court: The defendant?

The Witness: Yes, sir.

Mr. Strong: I offer in evidence Government's Exhibits 50-A, 50-B, 51-A and 51-B.

Mr. Katz: If the Court please, with respect to 50-A and 50-B, I interpose the objection that there is no foundation laid, incompetent, irrelevant and immaterial, that the matters set forth therein are embraced within the privilege [1015] communication rule, and not within the issues of the case, and no corpus delicti has yet been established, also subsequent in time to the offense included within the indictment as against the defendant Himmelfarb.

The Court: That is 50?

(Testimony of William S. Malin)

Mr. Katz: That is Exhibit 50. Now with respect to 51-A and 51-B, those matters are subject to the same objection, plus the fact that they are hearsay as to Himmelfarb.

The Court: As to 51-A and 51-B as to the defendant Himmelfarb the objection is sustained.

As to 50-A and 50-B the objection is overruled as to the defendant Himmelfarb.

Mr. Robnett: I wish to interpose the objection to 50-A and 50-B.

The Court: As to 50-B, that relates to Himmelfarb?

Mr. Robnett: On the ground that they are hearsay as to the defendant Ormont.

The Court: The objection is sustained as to the defendant Ormont.

Mr. Robnett: As to 51-A and 51-B, I object on the ground that they are confidential communications and are within the rule prohibiting their use because this witness was an agent for the attorney of Mr. Ormont at the time, and that in addition thereto they are subsequent to all charges in the indictment and do not tend to prove or disprove anything in the [1016] issues in the indictment, the indictment in this case being for the year 1944 and the years prior. These are taken long after in 1945.

The Court: The objection is overruled as to 51-A and 51-B as to the defendant Ormont.

Incidentally, there isn't any foundation as to when they were sent?

(Testimony of William S. Malin)

Mr. Strong: May we have the envelope, your Honor? That will show it.

(The document referred to was passed to counsel.)

Mr. Strong: I offer in evidence the envelope as Government's Exhibit 52.

(The envelope referred to was marked Government's Exhibit No. 52 for identification.)

The Court: There is no foundation. There is no testimony as to what was in the envelope.

Mr. Strong: I thought he said he sent these in the envelope.

Mr. Robnett: We object on the ground there is no foundation laid.

Q. (By Mr. Strong): When were they sent, Mr. Witness? A. May I see the envelope?

Q. To refresh your recollection?

A. Yes. [1017]

Q. This is Exhibit is Exhibit 52 for identification.

A. July 31st.

Q. What year? A. 1945.

Q. When were those statements prepared, 51-A and 51-B and 50-A and 50-B?

Mr. Robnett: I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Katz: Same objection heretofore made, if the Court please, if I may make it that way without restating it.

The Court: Overruled.

The Witness: Is there a date on that statement?

(The document referred to was passed to the witness.)

(Testimony of William S. Malin)

Q. (By Mr. Strong): I will show you 50-A.

The Court: The approximate date of their preparation, Mr. Witness. I don't think counsel means for you to give the precise moment.

The Witness: It is dated July 30, 1945.

The Court: The objections are overruled and the documents are admitted in evidence as I have indicated; that is to say, 50-A and 50-B as admitted as against the defendant Himmelfarb only and 51-A and 51-B as against the defendant Ormont only.

(The documents referred to were received in evidence and marked Government's Exhibits Nos. 50-A, 50-B, 51-A and 51-B.)

Mr. Katz: May we interpose an objection to Exhibit 52, if the Court please?

The Court: I thought you did.

Mr. Katz: Not with respect to the admission of Exhibit 52.

The Court: Very well.

Mr. Katz: With respect to that, if the Court please, we still feel that there is no foundation laid and I object to it on that ground.

Mr. Robnett: We join in that objection.

The Court: Sustained. There is no foundation laid.

Mr. Strong: No objection, if the Court please.

Mr. Katz: I now move to strike Exhibit 50 on the ground that there is no foundation laid for its admission, as well as on the grounds previously stated.

(Testimony of William S. Malin)

Mr. Robnett: I join in the objection and also make the same objection to 51-A and 51-B.

The Court: Overruled.

Q. (By Mr. Strong): I now show you Government's Exhibit 51-C for identification and ask you if you ever sent that to Mr. Bircher, ever mailed it to him. A. Yes.

Q. The name in ink, Sam Ormont, did you see that [1019] placed on that document?

A. I would say yes. I am not sure that I did, but that is his signature and I know I prepared this, helped to prepare it. Mr. Bircher wanted the information and I prepared it and Mr. Ormont signed it.

Mr. Robnett: Move to strike as not responsive and only an opinion of the witness.

Mr. Strong: He said, I said yes.

Mr. Robnett: But he went on and said he wasn't sure.

The Court: No, he didn't say he wasn't sure; he said he prepared it at Mr. Bircher's request and then had Mr. Ormont sign it and sent it to Mr. Bircher.

The Witness: That is right.

The Court: The motion to strike the answer is denied.

Q. (By Mr. Strong): I show you Government's Exhibit 50-D for identification and ask you whether you prepared this, had it signed and sent to Mr. Bircher.

The Court: What was the other one?

(Testimony of William S. Malin)

Mr. Strong: 51-C. This is 50-D.

The Witness: That is correct.

The Court: What is correct.

The Witness: That I prepared it and Mr. Himmelfarb signed it. That is his signature.

Mr. Katz: I didn't get the answer. [1020]

The Witness: The same answer respecting Himmelfarb and Mr. Ormont, that is, that at Mr. Bircher's request I prepared this and Mr. Himmelfarb signed it.

Mr. Strong: I now offer in evidence Government's Exhibit——

Mr. Robnett: Pardon me.

The Court: And what happened to it?

The Witness: Judging by the date they were both sent in at the same time.

The Court: Did you send it to Bircher?

The Witness: Yes, I feel I did.

The Court: You feel you did?

The Witness: Yes.

The Court: You caused it to be sent?

The Witness: I caused it to be sent. That is more accurate.

Mr. Robnett: May I see them, please?

(The documents referred to were passed to counsel.)

Mr. Strong: I offer in evidence Government's Exhibit 50-D for identification and 51-C for identification.

Mr. Robnett: As to the witness' answer on 50-D, your Honor, that was not admitted—I mean no

evidence has been admitted as to Mr. Ormont on that, and I want to move to strike the answer to interpose an objection on Mr. Ormont's part that it is all hearsay as to Mr. Ormont. I interpose that objection [1021] to it as far as these are concerned.

The Court: As to Exhibit 50-C?

Mr. Robnett: 50-D.

The Court: 50-D?

Mr. Robnett: Yes.

The Court: The objection is sustained as to the defendant Ormont.

As to 51-C, the objection is sustained as to Himelfarb on the ground in each instance that they are hearsay.

Mr. Robnett: I want to make a further objection on behalf of Mr. Ormont as to 51-C on the ground that it is incompetent, irrelevant and immaterial, and this is a privileged communication which the witness received from Mr. Ormont through Mr. Ormont's attorney, and it is therefore a privilege. [1022]

Mr. Katz: With respect to 50-D, if the Court please, we have objected upon the ground that there is no foundation laid; no corpus delicti has been established; it is incompetent, irrelevant and immaterial, and not within the issues in this case.

The Court: Other than as I have just indicated, the objections are overruled.

Q. (By Mr. Strong): Showing you Government's Exhibit 51-A, which is the statement signed by Sam Ormont, where did you get the information which is contained on that document?

Mr. Robnett: I object, if the Court please, upon the ground that it is incompetent and immaterial and also privileged, where he got the information; and the exhibit speaks for itself.

The Court: If the exhibit speaks for itself——

Mr. Strong: It doesn't, your Honor.

The Court: The objection of privilege is not good. Do you want to object to this too? I will be thinking about both of them at the same time.

Mr. Katz: If the Court please, this is one that is not within the rule. It is 51.

The Court: Objection overruled. Where did you get the information for the data on this sheet?

A. I got the information from the taxpayer's records, [1023] the taxpayers' records.

Mr. Strong: Give the name.

A. Mr. Ormont. The cash in bank I got from the bank balance; and the cash on hand is what Mr. Ormont estimated he had on hand on April 30, 1945. Government bonds I got from the inventory we took of the Government bonds, of which we have a list. The capital account of the Acme Meat Company was from the books at that date. The next item is profits, January 1st, 1945, to April 30, 1945. I don't know where that was from. That was probably accumulated profit of the Acme Meat Company for the first four months.

The Court: Where did you get the information?

The Witness: From the books, your Honor, from the books of the Acme Meat Company.

Mr. Robnett: I move to strike the answer, if the Court please, and also to strike the exhibit it-

(Testimony of William S. Malin)

self, 51-A, upon the ground that it is now shown that all of this information was obtained by this gentleman while he was employed by the attorney for Mr. Ormont, and as agent for that attorney, and it is, therefore, privileged, and was privileged, and it is improper to admit it at this time.

The Court: He lost the privilege when he disclosed it to Government agents. Objection overruled. Motion to strike denied. [1024]

Q. (By Mr. Strong): Mr. Witness, I show you Government's Exhibit 50-B, which is a sheet with the name "Phillip Himmelfarb" on the top, and ask you where you got that information.

Mr. Katz: Objected to, if the Court please, upon the ground that it is incompetent, irrelevant and immaterial, and calls for the conclusion of the witness; that it is within the confines of the privilege rule; no foundation has been laid; and it has not been established that there was any authority and direction to deliver that to any person at any time at any place. No corpus delicti has been established.

The Court: Overruled.

Mr. Robnett: I object to it on behalf of Mr. Ormont as hearsay.

The Court: Let me see that? That objection is overruled. Sustained as to Ormont.

A. I got this from Mr. Himmelfarb. The cash on hand is the amount he had deposited in bank; that is, the \$22,000 odd dollars. Cash in banks, I got from bank balances.

(Testimony of William S. Malin)

The Court: Just a minute. You said you mailed that to Mr. Bircher?

The Witness: I believe I did.

The Court: Were all these documents mailed at the same time?

The Witness: I think they were. They were dated July 30th. [1025] They must have been.

The Court: Is that your best recollection?

The Witness: Yes.

The Court: Your answer is no, or you don't remember, or what?

The Witness: It is my best recollection they were.

The Court: That they were mailed at one time?

The Witness: Yes.

Mr. Strong: Go ahead.

The Witness: The war bonds were bonds he had at cost; and the four family flat, and all of these assets, automobile, truck, adding machine, came from his records; and the Acme Meat Company receivables is what he said was receivable from the Acme Meat Company. I believe it was salaries accrued, and the liabilities, small items there, were what he told me he had owed.

Q. By "he" you mean who?

A. Mr. Himmelfarb.

Mr. Katz: I move to strike the portion of the answer that it is a communication from the defendant Himmelfarb to the witness.

The Court: Objection overruled. The witness has testified that Mr. Himmelfarb signed that, and

(Testimony of William S. Malin)

it was sent at the same time as the other, with his letter, which was addressed to Mr. Bircher. [1026]

Q. (By Mr. Strong): I will show you Government's Exhibit 51-C, and ask you where you got the information contained in that letter.

Mr. Robnett: Same objection as I have interposed to 51-A, if the Court please.

The Court: Let me see it. Did you say you prepared that?

The Witness: Yes, I did. Mr. Bircher asked me to answer certain——

The Court: Did you prepare that?

The Witness: Yes, sir.

The Court: Mr. Ormont sent it?

The Witness: Yes. But I submitted this to the attorney first, because there were some—I don't know whether I am responsive or not——

The Court: I think you had better not do any more than respond to the question. Now will you state the objection, Mr. Robnett?

Mr. Robnett: I object upon the ground that it is a privileged communication, and there is no authority shown to this witness to divulge the things contained therein, or to transmit the letters and documents to Mr. Bircher, or anyone else. The only authority he got was through the attorney, who was attorney for Mr. Ormont. It is privileged.

The Court: Objection overruled.

Q. (By Mr. Strong): Will you state where you got the information which [1027] you put into this letter which you have before you?

(Testimony of William S. Malin)

The Court: Did you state as one of your grounds that it was immaterial?

Mr. Robnett: Yes.

The Court: Objection sustained.

The Witness: What do you want me to do, your Honor?

The Court: The objection is sustained. It is immaterial where he got it.

Mr. Strong: I would like to try to break down a privilege by showing where he got it, and continue from there.

The Court: It is immaterial.

Mr. Strong: To break down a privilege?

The Court: It is immaterial. I have already ruled against the privilege and held that is not privileged.

Q. (By Mr. Strong): I show you Government's Exhibit 6, and ask you if you prepared the original of this income tax return, which is the return for the year 1944, for Sam Ormont and Phillip Himmelfarb?

Mr. Robnett: I submit that is a misstatement of facts.

Mr. Strong: I did not state any facts. I asked a question.

Mr. Robnett: Then he assumes a fact not in evidence in this case, that it was a return for the year 1944. I don't believe it is. I think it is a return for the fiscal year. [1028]

Mr. Strong: The return which bears in the

(Testimony of William S. Malin)

upper right-hand corner the figures 1-9-44, simply to designate what it is.

The Court: The jury will disregard the remarks and statements. It is Exhibit No. 6. That is sufficient identification.

Q. (By Mr. Strong): Did you prepare Government's Exhibit 6? A. Yes.

The Court: The original of which that is a photostatic copy?

The Witness: I did, yes.

Q. (By Mr. Strong): And that is your signature on the last page, William F. Malin?

A. Yes, sir.

Q. And the statement on this return, Government's Exhibit 6, next to the words: Business or Profession; it says: Miscellaneous Enterprises. Where did you get that information?

A. I got that from——

Mr. Robnett: I object as immaterial, incompetent and irrelevant and privileged.

The Court: Overruled on the ground of privilege. Sustained on the ground that it is immaterial.

Mr. Strong: May I be heard on that, your Honor; just a [1029] few words?

The Court: You have got to have a very good idea.

Mr. Strong: I will try to get it across.

The Court: I have overruled the question of privilege. The defendant signed it?

Mr. Strong: Yes.

(Testimony of William S. Malin)

The Court: What difference does it make where he got the information?

Mr. Strong: We are trying to prove what the income was for the year 1944, and submit that is material.

The Court: Where he got the information?

Mr. Strong: Yes, your Honor. He prepared it.

The Court: Objection sustained upon the ground that it is immaterial. Just a minute. I will reverse myself on the ground that it is immaterial. It is material, because of the element of wilfulness in the charge.

Mr. Strong: I will add that as one of my reasons.

The Court: I have already reversed myself, so you may answer the question: Where did you get the information?

The Witness: What is the question?

Q. (By Mr. Strong): Where did you get the information which is inserted here: Miscellaneous Enterprises. Where did you get that information?

A. From the attorney, Mr. Mirman. [1030]

Mr. Robnett: I move to strike the answer, if the Court please, upon the ground that it is not binding upon this defendant, and would be hearsay.

The Court: Overruled. Motion denied.

Mr. Katz: If the Court please, I interpose the objection, and move to strike upon the ground that it is a privileged communication. The signing of a document disclosing the information contained

(Testimony of William S. Malin)

therein, does not waive the privilege of the source from which the information was obtained.

Mr. Robnett: I would like to join in that.

The Court: Motion denied. [1031]

Q. (By Mr. Strong): I show you this item here on the front page, item 12 on the return says, "other income, state nature of income," and then the words, "miscellaneous income, \$71,388.84." Where did you get that information?

Mr. Robnett: Object to that as having been asked and answered.

Mr. Strong: No, that wasn't the same question, your Honor.

Mr. Robnett: He asked him about the item under miscellaneous income.

Mr. Strong: No, I asked about miscellaneous enterprises, which is another line on top.

Mr. Robnett: Same objection to this question as interposed to the other.

The Court: Objection overruled.

Mr. Katz: Also my same objection, your Honor.

The Court: Overruled.

The Witness: Same answer.

The Court: From the attorney?

The Witness: From the attorney.

Q. (By Mr. Strong): Now this information contained on the fourth page of this document, which shows the words which are shown to be typed in, "Sam Ormont, 50 per cent, \$35,694.42," and then the [1032] address for Sam Ormont, then the name "Phillip Himmelfarb, 50 per cent, \$35,-

(Testimony of William S. Malin)

694.42," and the address of Phillip Himmelfarb, where did you get that information?

Mr. Robnett: I object to that and as to the last one as to Himmelfarb because it is hearsay as to Mr. Ormont.

The Court: The ruling will be the same. The objections are overruled except that which relates to Himmelfarb will not be admitted against Ormont and that which relates to Ormont will not be admitted against Himmelfarb.

Mr. Strong: May I be heard on that at this point?

The Court: Not now.

Mr. Strong: I think I may be able to change your Honor's ruling if I might be heard for a moment.

The Court: Not now.

Q. (By Mr. Strong): Will you answer? Where did you get that?

A. That is the division of the income 50-50.

The Court: No. Strike that. Where did you get the information?

The Witness: You are now referring to Schedule L, the division of the profits?

Mr. Strong: Yes.

The Witness: Which is the division of the income according to their statements to me that they divided it 50-50.

Mr. Strong: That is what I want to know.

Q. Now I show you on the fourth page under the section headed "Questions," the second item

(Testimony of William S. Malin.)

where it is printed, "nature of organization (partnership, syndicate, pool, joint venture, etc.)" and then there is typed in the words "joint venture," where did you get the information that this was a joint venture?

A. I used that word "joint venture." It wasn't a partnership. I got it from the statements to me that it was.

The Court: A joint venture?

The Witness: A joint venture.

The Court: Who gave you the information? That is what he wants to know.

The Witness: Each of the defendants.

Q. (By Mr. Strong): When was that?

A. I think it was May 23.

Q. Where was that?

A. In the South Gate plant.

Q. Who was present?

A. Mr. Ormont and later Mr. Himmelfarb, but I spoke to Mr. Ormont first.

Q. Was that the first date on which the term "joint venture" was used between either you or Mr. Ormont or Mr. Himmelfarb or all three?

A. Yes, sir. [1034]

Mr. Robnett: I object to that, if the Court please, that whatever conversations they had were a privilege.

The Court: That objection is sustained. At least I do not mean whatever objections they had but as to this conversation.

Mr. Robnett: Yes, your Honor.

(Testimony of William S. Malin.)

Q. (By Mr. Strong): Anybody else present that day besides you?

A. No. There was a bookkeeper in the next room.

Q. Was the door open?

A. Yes, I guess it was.

Q. Could he hear what was said, do you know?

Mr. Robnett: I move to strike out the answer as a guess. He said he guessed it was.

The Court: It may be stricken.

There is an unanswered question, could he hear what you said.

Mr. Katz: That is objected to as calling for a conclusion and opinion of the witness. Objected to on that ground.

The Court: Objection sustained.

Q. (By Mr. Strong): Mr. Witness, as to these sums that are shown here of 50 per cent, \$35,694.42 to Sam Ormont, 50 per cent for \$35,694.42 to Phillip Himmelfarb, did you see any records with reference to those sums? [1035]

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial, also that it is privileged.

The Court: The question calls for a yes or no answer, and in view of that the objection is overruled.

The Witness: Well, yes.

Q. (By Mr. Strong): Did you see regular books and records? A. No, sir.

Mr. Robnett: Object to that as asking for an opinion of the witness.

(Testimony of William S. Malin)

The Court: Objection sustained.

Q. (By Mr. Strong): What did you see?

A. A slip of paper on which was written——

Mr. Robnett: I object to that, if the Court please, on the ground that it is privileged and incompetent, irrelevant and immaterial, also leading and suggestive.

The Court: There is no foundation laid as to when he saw it, who was present, and so forth.

Q. (By Mr. Strong): When did you see it?

Mr. Robnett: I object to that.

The Court: He said he saw a piece of paper.

Mr. Robnett: I know. I object to this question as immaterial. [1036]

Mr. Strong: It is foundation. He said there was no foundation.

The Court: Objection overruled.

The Witness: What was the question?

The Court: When did you see the slip of paper?

The Witness: May 23rd.

Q. (By Mr. Strong): Was that the only thing you saw, was a slip of paper? A. Yes, sir.

Q. What did it say on it?

Mr. Robnett: Object to that as the paper would be the best evidence; incompetent, irrelevant and immaterial, and privileged.

Mr. Strong: I will withdraw the question at this point.

The Court: Very well.

Q. (By Mr. Strong): Have you got the paper?

A. No, I haven't.

(Testimony of William S. Malin.)

Q. Do you have any work papers that you worked with? A. No, I haven't.

Q. Did you have?

A. I did have; yes, sir.

Q. Where are they?

Mr. Robnett: Object to that as immaterial.

The Court: Objection sustained.

Q. (By Mr. Strong): Did you make a copy of what is on the paper?

Mr. Robnett: I object to that as immaterial.

The Court: Objection sustained.

Mr. Strong: May I have one moment, your Honor? I may be finished with this witness.

Q. Does Government's Exhibit 6, which bears two signatures on the fourth page, were those placed on the document in your presence?

A. Yes, sir.

Mr. Robnett: That we object to as immaterial also.

The Court: Overruled.

Q. (By Mr. Strong): The signature of Sam Ormont, who signed that?

A. Mr. Sam Ormont.

Mr. Robnett: I will stipulate that Mr. Ormont signed that.

Mr. Strong: Same stipulation?

Mr. Robnett: I say I will so stipulate.

Q. (By Mr. Strong): As to the signature of Phillip Himmelfarb?

A. The defendant Himmelfarb signed it.

(Testimony of William S. Malin)

Mr. Katz: We stipulate that the defendant Himmelfarb signed it, your Honor. [1038]

The Court: You stipulate the defendant Himmelfarb signed it?

Mr. Katz: Yes, your Honor.

The Court: Very well.

Mr. Strong: No further questions.

Mr. Robnett: I have no questions.

Mr. Katz: No questions, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Strong: May we have a recess before I start the next witness? It is almost 3:00 o'clock.

The Court: Very well. Short recess. Remember the admonition.

(Short recess.) [1039]

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Katz: Yes.

The Court: Mr. Bircher.

DONALD BIRCHER

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Donald Bircher.

The Clerk: Your address?

The Witness: Glendale, California.

Direct Examination

By Mr. Strong:

Q. Mr. Bircher, what is your occupation?

A. Special agent, Bureau of Internal Revenue.

Q. How long have you had that job?

A. 20 years.

Q. Where are you located?

A. Los Angeles.

Q. During May, 1945, were you assigned to conduct an investigation as to the income tax of Sam Ormont and Phillip Himmelfarb?

A. I was.

Q. For what year? [1040]

A. For the year 1944 originally.

Q. Did you get any further assignment later?

A. Yes, subsequently.

Q. When?

A. Later in 1945 I was assigned to co-operate with Special Agent Phoebus and Internal Revenue Agent Eustice, to cover the years 1942, 1943 and 1944.

Q. Did you have any discussions in connection

(Testimony of Donald Bircher.)

with that investigation, with the defendants Ormont and Himmelfarb, during May, 1945?

A. Yes.

Q. Speak up a little louder. A. Yes.

Q. When was the first such conversation?

A. May 23, 1944, at the Acme Meat Company's office. I talked with——

Q. What date?

A. May 23, 1945, at the Acme Meat Company's office, Imperial and Garfield Boulevards, South Gate. We talked with Mr. Ormont—that is, Mr. Phoebus and I.

Q. That was the day and the occasion which was heretofore testified to by Mr. Phoebus?

A. Yes.

Q. And on that occasion, as I understand Mr. Phoebus' testimony, you did not warn the defendant as to his rights, is [1041] that right?

A. That is correct, I believe.

Q. When was the next time that you had a conversation with either or both defendants?

A. The following day, May 24, Mr. Ormont——

Q. What date?

A. May 24, 1945, Mr. Ormont came to our office.

Q. Where?

A. Room 844 in the Post Office Building, here.

Q. Who was present besides you and Mr. Ormont?

A. Walter E. Slick, Deputy Collector; Mr. Phoebus and Mr. Slick were both Deputy Collectors.

Q. And Mr. Ormont? A. Yes.

(Testimony of Donald Bircher.)

Q. Did you, on that occasion, warn Mr. Ormont as to his constitutional rights?

Mr. Robnett: I object to that as leading and suggestive.

The Court: Objection sustained.

Q. (By Mr. Strong): What did you say on that occasion?

The Court: With relation to the rights of the defendants. A. I told Mr. Ormont——

Mr. Katz: If the Court please, we make the objection that it is hearsay against the defendant Himmelfarb. May it be understood that that objection and ruling continues? [1042]

The Court: Objection sustained as to the defendant Himmelfarb as to this conversation.

A. I told Mr. Ormont that we would like to discuss his income tax liability and income tax affairs with him, and that he had the right to be accompanied by an attorney, and have the counsel of an attorney, if he desired. That he was not required to give us any testimony; and that any statements he made, or documents he produced, at that interview, might be used in court against him in some matter at some future time. And he asked specifically whether any statements he made to us might become knowledge available to certain other Government agencies. And I told him that normally any information given the Internal Revenue Department would be held in confidence by that department, but that if a criminal trial should follow, such information might be disclosed at any

(Testimony of Donald Bircher.)

such trial; and I asked him if he cared to have an attorney present, and he said that he did not care to have one; he did not think he needed one in order to tell the truth. He said he did not want to have any trouble; that he wanted to pay whatever was due the Government. He said that he had made quite a large sum of money. [1043]

Q. Wait a minute now. I am asking you as to what you said to him as to his constitutional rights and you have answered that.

Now will you state what was said by Mr. Ormont in that interview, what questions were asked him, what answers were given by him, with reference to his income for the period that you were investigating?

A. Mr. Ormont stated that he and Mr. Himmelfarb had had an indefinite business arrangement which was somewhat similar to a partnership or joint venture business, but that he did not want it commonly known that they had had such an arrangement because of fear that some other government agency might cause him embarrassment; he said that he had been receiving certain subsidy benefits to which benefits some other government agency might challenge his right since he had represented to the other agencies that he was doing business as an individual and operating the Acme Meat Company as an individual proprietor; he said in fact that he and Mr. Himmelfarb had an arrangement which began on May 1, 1944, whereby they would share equally from the profits, that is

(Testimony of Donald Bircher.)

the legitimate profits he specified, of the Acme Meat Company, which were wholesalers and packers of meat.

He said they would share equally in such legitimate profits as to the first \$24,000 and that any legitimate profits above that sum belonged to him.

He said he had other profits resulting from over-charges to customers. He said he preferred to call such over-charges bonuses or gifts because of the fact that he might get into difficulty with other governmental agencies.

He said these bonuses or gifts totaled a little in excess of \$70,000 for the period from May 1, 1944, to April 30, 1945.

He said that he kept no books or records regarding such side profits that they had made from the customers of the Acme Meat Company.

He said that the side charges or collections from the customers of the Acme Meat Company had not been uniform, had not been determined on the basis of so much per pound, that the over-charges or excess charges which had not been recorded in their books or records fluctuated and determined upon the market, how much the customers were willing to pay on the side.

He said he didn't want it known that they had gotten those over-charges for fear of cancellation of the license of the Acme Meat Company to do business as a packing house or as a wholesaler. That he said was his principal concern. He wanted to pay whatever taxes he owed, which he and Mr.

(Testimony of Donald Bircher.)

Himmelfarb, his associate, had not reported in their 1944 individual returns which had been made on the calendar year basis. [1045]

He said that he and Mr. Himmelfarb were that day filing or had filed a fiscal year return reporting the total of these unrecorded profits.

I asked him if he had a record of such unrecorded profits and he produced a small memorandum book, rather gold fabric or gold colored paper cover back, about an inch and a half by $2\frac{1}{2}$ inches, and I asked him if he would give me the page out of that book upon which he had a few figures recorded showing, which he said showed the profit, the net profits, from these unrecorded over-charges for the period April 30, 1944, or May 1, 1944—I am not sure—to January 5, 1945, and for the period from January 5, 1945, to May 1, 1945, or April 30, the day before, 1945.

These figures totaled about a little in excess of \$35,000, and something in excess of \$11,000 was recorded as having been earned from the secret charges or unrecorded charges during the first portion of the period, which was from May 1, 1944, to January 5, 1945, and the balance of the sum in excess of \$35,000, or some \$23,000, was recorded as shown as having been earned from excess charges and unrecorded charges from customers during the period January 5, 1945, to April 30, 1945.

I asked him if he would let me have that record, and he said he would not.

(Testimony of Donald Bircher.)

I asked him to give me that page out of the book so I [1046] could copy them and he did that and I copied the figures while he sat there with me, and I still have them.

He said that he had talked with Mr. Himmelfarb regarding their dilemma and worry about having gotten these secret charges on the side, and he said that he wanted to do whatever he could to straighten the matter out, to pay up quickly, that he wanted to be able to walk around and look people in the face again, that he had worried a lot about the matter.

Q. Was anything said as to how the money which you testified to was divided?

A. He said that he and Mr. Himmelfarb——

The Court: He just answered that a few moments ago. The witness related that a moment or so ago.

The Witness: I would like to answer it completely. I did not finish my answer.

The Court: All right.

The Witness: He said that he and Mr. Himmelfarb usually collected these excess or unrecorded charges in cash daily from their customers.

He said Mr. Himmelfarb made most of the collections from the meat customers at the same time they paid their regular bills; that in addition to these invoice bills he would collect so much on the side and the amount would depend upon the fluctuating market, whatever the supply of meat would indicate. [1047]

(Testimony of Donald Bircher.)

He said that they divided their profits every day, sometimes every three days, sometimes maybe three times a week; that they each kept a memorandum of the amount that they divided and that each time they made a division of these cash profits, unrecorded cash profits, that they added to that amount that they divided that day the amounts previously divided and that they kept only that running balance. They kept no books and records regarding the extra charges they collected.

He said that he had talked the matter over with Mr. Himmelfarb regarding the fact that neither one of them had reported these extra charges, the extra income, in their 1944 returns, and that he felt that Mr. Himmelfarb would cooperate with us.

I told him that we planned to go immediately and interview Mr. Himmelfarb.

At that time I asked him if he wanted to make a statement before a stenographer, so that we would have a record of it so that no one would forget what was said on that occasion. He said that he did not care to do that, and at this conference or on my table, Deputy Collector Schlick made notes during the interview in plain sight of everyone, kept current notes. Deputy Collector Phoebus also made certain notes.

After this preliminary interview I asked Mr. Ormont if it was agreeable if I would prepare an affidavit with him and [1048] for him to review and sign at that time. I thereupon prepared in long-hand just one affidavit, no copy of it, there at my

(Testimony of Donald Bircher.)

desk. We went over each sentence, Mr. Ormont and I, with the others present. [1049]

At the conclusion of that I asked him to be sworn, and to sign the statement, and he was sworn and signed the statement, and left the statement with me.

Q. Is that all that happened at that interview?

A. At the conclusion of the interview Mr. Ormont left. He said that he would give us free access to anything we wanted. I asked him if he had any record that we could refer to to verify this extra or side extra collection—this money he had gotten from extra collections. He said that he had no record, and that they had kept no record, except the daily running total.

I asked him if he would give me the names of a few of his retail meat customers, so I might contact them, and try to verify those payments, and try to verify his total, as he had reported to us, and he said no, he did not think that it was necessary. And thereupon he left the office, and agreed that we could have free access to the books and records, and go ahead and make our own determination as best we could.

And he left our office at that time, and we thereupon promptly drove to his office at the Acme Meat Company in South Gate, and as we entered the yard he also drove in; and Mr. Himmelfarb was in the yard and Mr. Ormont brought Mr. Himmelfarb over and introduced him to us, and told him who we were. And thereupon I asked Mr. Himmelfarb if he would——

(Testimony of Donald Bircher.)

Mr. Katz: I object to this, if the Court please, as not [1050] responsive to the question. This is relating a conversation up at the office.

The Court: I think he has answered your question.

Q. (By Mr. Strong): Subsequent to that interview that day, at the office, did you have any other interview with Mr. Ormont, on that same day, or any other day?

A. Yes, later that day. That was about 2:30 that they left.

Q. Where was it held?

A. In the office of the Acme Meat Company, South Gate.

Q. Who was present?

A. Mr. Himmelfarb, Mr. Ormont, Deputy Collectors Phoebus and Slick, and myself.

Q. Will you testify what occurred, and what was said upon that occasion?

Mr. Katz: That is objected to, if the Court please, as to the defendant Himmelfarb, upon the ground that no foundation has been laid; it is irrelevant and immaterial; and that no corpus delicti has been established.

Mr. Strong: At this time, I would like to state, your Honor, that the corpus delicti has been established, and I am offering this testimony as to Mr. Himmelfarb as well as Ormont. If your Honor desires me to state what I consider to be the corpus delicti, I can do so. [1051]

(Testimony of Donald Bircher.)

The Court: Where is there sufficient foundation laid to permit this conversation against the defendant Himmelfarb.

Q. (By Mr. Strong): Would you state the conversation? And this is being offered as to the defendant Ormont—the conversation and what transpired.

A. There were two portions of the conversation. The first portion was when we first arrived in the yard of the Acme Meat Company, and Mr. Ormont introduced us to Mr. Himmelfarb. We told him who we were, and that we wanted to talk to him regarding his income tax matters, and at that time I asked Mr. Himmelfarb if he was agreeable to discussing matters with us; and we got into the back seat of Mr. Slick's automobile. Mr. Himmelfarb and I sat in the back seat, and Deputy Collectors in the front seat. Mr. Ormont went into the office of the Acme Meat Company, and left us sitting in the yard.

Q. Mr. Ormont left you at that point?

A. Yes.

Q. Did you again, during the same day, and during this same interview, see Mr. Ormont?

A. Yes.

Q. And where was that?

A. In the office of the Acme Meat Company.

Q. Who was present? [1052]

A. Mr. Ormont, Mr. Himmelfarb, the two Deputy Collectors, and myself.

Q. Will you state what was said, and what transpired at that point?

(Testimony of Donald Bircher.)

The Court: This is as to Sam Ormont only?

Mr. Strong: Yes.

A. Mr. Ormont asked us if we would step into his small office, out of the regular large business office, and we did. That was a small office, I guess not over 6 feet square, and five or six of us were standing around in that office. There was hardly standing room. There wasn't room for anyone to sit down.

Q. Whatever position you were in, will you tell us what happened?

A. It was cramped quarters. Mr. Ormont stated that he would like to see the affidavit he had signed at our office, since he then held in his hand the affidavit I had prepared for Mr. Himmelfarb to sign. He said, "I would like to compare them." He did not think they were the same, and consistent with one another. So I let him see the same affidavit he signed, and which was on Government letter-head paper, at our office.

Mr. Ormont then took his two hands and started folding these two affidavits together. I stepped in quickly, and put my hand between his two, and grabbed the affidavits. I [1053] said, "Don't do that." I said, "You are trying to destroy Government property. Apparently that is what you have in mind. You had better be careful." I said, "That is very serious. Give it a lot of thought before you do it." Mr. Ormont held on firmly, and I held on firmly; and I reminded him of that many times.

(Testimony of Donald Bircher.)

He began to twist and crush the paper, and twist my hand. I still held on vigorously. Finally he gnashed his teeth, and started jumping like a wrestler, and finally something happened, and he went out the door and went down the bloody spillway, I chasing after him.

The Court: What did you do when he gnashed his teeth?

A. I gnashed mine.

Q. (By Mr. Strong): Who had the affidavit?

A. Mr. Ormont took with him the affidavit as he broke away from me, and ran through the door, and down the bloody spillway, where they were slaughtering cattle. I ran after him. By the time I got to him he was standing alongside a large can of debris, from the bloody animals. I asked him to give me the affidavit. He said he couldn't. I told him he had better. And thereupon we walked back into the office, and had some further discussion.

Then we told him we would go into the matter further at a later date. [1054]

Mr. Himmelfarb and the two Deputy Collectors and I were present during all this that I have related. Do you want me to go on to any subsequent conversations with the defendant Ormont?

The Court: Was that the end of that conversation?

The Witness: Yes, that is the end of that. The following day, yes.

Q. (By Mr. Strong): Where?

A. At Mr. Ormont's bank.

(Testimony of Donald Bircher.)

Q. Who was present?

Mr. Robnett: Before going into this, I move to strike that other answer, as not a statement of the conversation, which pertains to the issues in this case. He is talking about acts more than anything else.

Mr. Strong: It goes to wilfulness? It is part of the whole transaction.

The Court: It is only admissible on the basis that the original document is not available, and as a foundation to admit the testimony concerning the contents of the document.

Q. (By Mr. Stone): Will you state the contents of the document which was given by Mr. Ormont, which you have just testified to, as an affidavit?

Mr. Robnett: I ask that the jury be instructed that they [1055] are only to consider it for the limited purpose your Honor has said.

The Court: That is correct. That is merely foundation testimony to permit this witness to testify to what was in the document, because the Government either has to produce the original, because the defendant cannot be compelled to produce the document, if they depend on it, or they have to show a reason why the original can't be produced.

The Witness: The affidavit that I prepared on May 24th, at our office in this building——

The Court: That is the one you were just talking about, the gnash episode?

The Witness: That's correct. The affidavit stated that Mr. Ormont had received approximately

(Testimony of Donald Bircher.)

\$35,000 extra income, not reported on his books and records, and the portion which he had received in 1944 he had not reported on his 1944 income tax return. That is about all.

The Court: It was a short affidavit then, wasn't it?

The Witness: Yes, only about ten lines.

Q. (By Mr. Strong): Is that the substance of it? A. Yes. [1056]

Q. Now on May 24th, on that occasion that you just testified to, was there any discussion with reference to bonds?

The Court: May 24th? Where is this?

Mr. Strong: At the plant.

The Court: With Mr. Ormont?

Mr. Strong: Yes.

The Witness: I can't be definite that we discussed it on that date. The following day we did.

The Court: How did you happen to get over to the bank there the next day? Did you and Ormont just happen to be in there coincidentally at the same time?

The Witness: No, your Honor. Mr. Malin called me the next day, said he had been retained as a certified public accountant to represent Mr. Ormont in his tax difficulties; said he wanted to apologize on behalf of Mr. Ormont for what had happened and that he wanted to know what he could do to help straighten it out.

He said we were——

Mr. Robnett: I move to strike out this as a vol-

(Testimony of Donald Bircher.)

untary statement and not responsive to the question your Honor asked. You asked him how he got over to the bank.

The Court: Yes. It is responsive.

Mr. Robnett: It contains hearsay also.

The Court: Yes, it does. It is good on that ground. [1057]

Mr. Strong: It is the confidential agent of the defendant, your Honor.

The Court: The answer is stricken.

The Witness: Shall I answer it?

The Court: You can answer it summarily without stating the conversation.

The Witness: Yes. I met Mr. Ormont at his bank on May 25, 1945. On that occasion Mr. Ormont said that we could examine——

The Court: How did you happen to get there?

The Witness: By prearrangement with his accountant. We all met together. At that time Mr. Malin was present, Mr. Ormont, the deputy collectors and myself.

We thereupon went to the safe deposit box section and Mr. Ormont obtained his key and we were taken to a small room where he opened the safe deposit box.

Q. (By Mr. Strong): Who is "he?"

A. Mr. Ormont opened the safe deposit box, and I asked Mr. Malin to take out his work papers and copy in our presence so that we could watch him, each document as it was taken out of the safe deposit box by Mr. Ormont or by himself.

(Testimony of Donald Bircher.)

Mr. Ormont stood alongside of me and the deputy collectors, Mr. Malin sat down at the table in front of us and made the list, as the bonds were taken out one at a time. [1058]

Q. Before you go further into the events of that day, I will show you Government's Exhibit 42 and ask you if this is the list that was made as you have just testified.

A. Yes, that is the list; Exhibit 42.

Q. Now will you continue with the conversations and occurrences?

The Court: This is still at the safe deposit box?

The Witness: In the little booth where we were inventorying the safe deposit box.

The Court: About as big as his office?

The Witness: About the same size, just room for the four of us to stand up and one to sit down at a little short table. And it was hot and stuffy. We all complained about it.

Mr. Ormont stated that he had purchased most of the bonds that were in his box, even though a portion of them were recorded in the name jointly with the name of his mother, Mrs. Dora Goldberg; he had purchased them with his funds mainly from the extra charges that he had collected on the side which are not recorded in his books. Some of them he had purchased in earlier years with some of his savings.

He stated that he noticed that one of the bonds we came to was recorded in his name alone and not in the name of his mother and he jointly, and

(Testimony of Donald Bircher.)

he asked us whether we thought it was possible for him to get it corrected so that it could be in their names jointly. He said that although it was his [1059] funds, yet he wanted to have it in the name of himself and his mother.

We just completed our examination, Mr. Malin took his original sheet that he had compiled in our presence and we all watched him mark down the numbers and the dates, the payees of the bonds, and thereupon Mr. Ormont closed his safe deposit box and we started to the front sidewalk in front of the bank.

At that time Mr. Ormont came over to me on the side and apologized repeatedly for what he said he had done the day before.

Mr. Robnett: What did he say, if you remember?

Mr. Strong: I am asking the questions at this point, your Honor.

Mr. Robnett: Then I move to strike out his conclusion on the ground that it is a conclusion of the witness. He said he apologized repeatedly.

The Court: It will be stricken.

Q. (By Mr. Strong): Don't go into the apology at all. A. All right.

Mr. Ormont said that he wished to apologize for his actions the day before in having taken the affidavit from me forcefully and doing away with it, and he asked me what could be done to straighten out the situation. I told him the thing [1060] for him to do was to produce the affidavit.

(Testimony of Donald Bircher.)

He said he couldn't do that.

Then there was some other conversation. He said that he always attempted to keep in good physical condition, and we made certain remarks about what had happened the day before——

Q. Did it have anything to do with the income tax or his income?

A. No, but one remark did.

Q. Let's have it.

A. He said, "Mr. Bircher, as proof of my patriotism, I want you to know that all this extra money I got on the side I put in war bonds."

That is about all.

Q. Did that end the conversation at that time?

A. He said he would be glad to give us whatever he could and he was very sorry for what happened and that he would instruct his accountant to cooperate with us, give us what assistance he could in arriving at his tax liability.

Q. Was that all that was said on that occasion?

A. Yes, that is all.

Q. Now I show you Government's Exhibit 50-A, B, C, D, and I show you also Government's Exhibits 51-A, B, C and D and ask you if you ever saw those before, and also Government's Exhibit 52 for identification.

A. Yes, I have seen each of these papers. [1061]

Q. And where did you get Government's Exhibits 50-A, B, C, D and 51-A, B, C and D?

A. I received them all through the mail at my office upstairs from Mr. Malin.

(Testimony of Donald Bircher.)

Q. Did you receive them in that envelope?

A. Yes.

Q. That is Government's Exhibit 52 for identification?

A. Yes. At the time I received them I opened the letter and stapled the envelope to them and they have been intact ever since.

Q. Until I unstapled them?

A. That is correct.

Q. Here? A. That is correct.

Mr. Strong: I offer in evidence Government's Exhibits 50-C, 51-D and 52.

The Court: Admitted.

(The documents referred to were received in evidence and marked Government's Exhibits 50-C, 51-D and 52.)

Q. (By Mr. Strong): Now in connection with Government Exhibits 50-A, B, C, D and 51-A, B, C and D, did you at any time have any discussion with the defendant Ormont as to the documents themselves? A. No. [1062]

Q. Did you have any discussions with the defendant Himmelfarb as to those documents?

A. No.

Mr. Strong: I would like to have this piece of paper, which is stapled to a bigger sheet, marked for identification, your Honor.

The Court: No. 53.

(The document referred to was marked Government's exhibit No. 53 for identification.)

(Testimony of Donald Bircher.)

Q. (By Mr. Strong): I show you Government's Exhibit No. 53 for identification.

Q. (By Mr. Strong): I show you Government's Exhibit 53 for identification and ask you if you ever saw this slip of paper which is stapled to the bigger sheet prior to this occasion? A. Yes.

Q. Will you state what that slip of paper represents, physically?

A. That is a sheet or paper Mr. Ormont gave me from his small notebook in which he had these same figures recorded.

Q. Is that what you testified to before, the slip of paper? A. Yes.

Q. And the figures on there, what figures are those?

A. Those are the figures that Mr. Ormont had recorded in his book which he gave me to copy.

Q. Whose handwriting are those figures in?

A. Those are in my handwriting, made in his presence on this slip of paper.

Mr. Strong: I offer in evidence Government's Exhibit 53 for identification.

The Court: Admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 53.)

Mr. Strong: Shall I stop now? You said we would run until 4:00 o'clock.

The Court: Very well. This case is continued until 10:00 o'clock Tuesday morning; the court is

recessed until 10:00 o'clock Monday. Remember the admonition.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, June 10, 1947.)

Los Angeles, California, Tuesday, June 10, 1947

10:00 A.M.

(The following proceedings were had outside of the presence of the jury:)

The Court: United States vs. Ormont and Himelfarb.

Mr. Strong: Ready.

Mr. Robnett: Ready. If your Honor please, at this time there is a matter I wish to call to the Court's attention——

The Court: The record will show the defendants are present.

Mr. Robnett: I want to present it without the jury being present. I call your attention to the transcript, on pages 1053 and 1054; that, as you will recall, was the testimony of the witness who is now on the stand, Mr. Bircher, with respect to what transpired down at the plant on the 24th day of May, 1945.

The Court: This is Mr. Phoebus' testimony?

Mr. Robnett: No, this is Mr. Bircher's testimony, and as to certain documents called affidavits, and what the defendant did in regard to taking those affidavits to them. If you will note, com-

mening at the foot of page 1053, to the top of page 1054, the witness says:

“I said, ‘Don’t do that.’ He said, ‘You are trying to destroy Government property. Apparently that is what you have in mind. You had better be careful.’ [1068] I said, ‘That is very serious.’ Give it a lot of thought before you do it.’ Mr. Ormont held on firmly, and I held on firmly; and I reminded him of that many times.” Then he goes on and states: “Finally he gnashed his teeth, and started jumping like a wrestler, and finally something happened, and he went out the door and went down the bloody spillway, I chasing after him.” Further, on that same page, lines 22 and 22:

“I asked him to give me the affidavit. He said he couldn’t. I told him he had better. And thereupon we walked back into the office, and had some further discussion.

“Then we told him we would go into the matter further at a later date.”

If the Court please, upon that evidence, I wish to say this to your Honor—I could hardly hear the witness the other day. I asked him to speak up. I did not get all the significance of this at the time in order to effect an objection? It is only since I have gotten the transcript.

I now, at this time, move to strike all of the testimony of the witness Bircher, as to conversations and transactions that happened after that incident he just testified to, on the ground that thereafter anything that the defendant said or did was,

of necessity, said and done under threat, and not voluntary, because here he was under a threat, that he had better [1069] not do this; he was destroying Government property; it was very serious, and that they would go into that matter further at a later date. And I think it is a sufficient showing to show that the defendant thereafter would be under fear as to anything he might say or do. The only other testimony given by the defendant——

The Court: By the defendant?

Mr. Robnett: I should not say the defendant. I mean by the witness, that this motion would not apply to, was his statement, of course, of the contents of the affidavit. This was only a groundwork for the admission of parole testimony.

I am not moving to strike that, your Honor. I am moving to strike all the other testimony. You will reserve that the other testimony goes into conversations down at the bank vault, with regard to bonds and bond lists, and the making of it, and all things that the defendant was supposed to have said at that time, and at that place, namely, at the bank—I think that all of that should go out upon the ground that anything that was said or done after by the defendant was done under these threats.

That would be borne out by the evidence of this same witness to the effect that thereafter Mr. Ormont many times, he says, told him he was sorry, and apologized, and such as that, showing that the defendant had some fear in his mind at the time, and wanted to correct anything that was done.

That is my motion, to strike all of that evidence that follows that, the conversation, and all things that happened with regard to his showing them the bonds, letting them take a list of the bonds, and also as to any furnishing of books or records thereafter, on the ground that that was and still is a threat.

The Court: I don't think I can reach that conclusion.

Mr. Strong: At this time, outside of the hearing of the jury, may I present a matter too?

The Court: Is this in relation to this matter?

Mr. Strong: No.

The Court: I don't think I can reach that conclusion, Mr. Robnett, from the testimony that has gone in to date. I will have to deny the motion.

Mr. Robnett: May it be considered, without my having to repeat it before the jury, that I have made this same motion before the jury, and the same ruling?

Mr. Strong: That is perfectly agreeable.

The Court: Very well.

Mr. Strong: At this time, your Honor, I would like to represent, and this is the last time, I promise, the question of how much warning, and what warning is necessary to be given by the agents before the testimony which they offer will be received in evidence, as to conversations by the defendants with them; and I would like to have these documents marked for [1071] identification, if your Honor please. I have a copy of them, and also have the originals for examination.

These are documents which relate to the authority of the agents, the first of which I would like to have marked being a copy of the credentials which the witness testified were shown to the defendants. That is, the witness Bircher, and the witness Phoebus testified, as to these credentials. I think on their face they indicate just exactly what the agent was doing, what was the scope of his authority. I submit they constitute a complete warning to any person who is being questioned or investigated, of what is going on; a sufficient warning to admit the admission of all conversations taking place subsequently between them.

The Court: I have admitted all of the conversations as to the defendant Ormont.

Mr. Strong: This is just as to Himmelfarb.

The Court: And I have admitted conversations of the defendant Himmelfarb with the witness Bircher, after this incident. You heard them read and described this morning, did you not?

Mr. Strong: I don't think I understand that your Honor did.

The Court: I did not admit conversations either; I admitted letters authorizing the agents.

Mr. Strong: The second point is that I want to again [1072] bring before your Honor's attention the scope of authority and function of these agents. I would like these documents marked for identification.

The Court: Let me see the cards.

The Clerk: Do you want to mark this card 54? This is a copy of the credentials.

Mr. Strong: 55 is a copy of a letter from the Treasury Department. I have here the original letter with the original signature of the Commissioner of the Bureau of Internal Revenue.

The Court: That will be 55.

(The documents referred to were marked Government's Exhibits 54 and 55 for identification.)

Mr. Strong: I want to submit to your Honor's consideration again, the fact, of course that from our position, no warning as to criminality had to be given the defendant Himmelfarb under the circumstances shown to exist in this case. Secondly, even if any warning had to be given the defendant Himmelfarb, he was fully on notice of precisely what was transpiring, on the basis of Government's Exhibit 54, which were the credentials which were shown to the defendant himself. On that basis, your Honor, I would like to ask your Honor to reconsider the ruling which does not permit me to go into conversations with the defendant Himmelfarb.

The Court: Will you refresh my memory? There was one [1073] occasion when the witness talked to the defendant Himmelfarb, which I excluded, is that correct?

Mr. Strong: Just one occasion.

The Court: And on one occasion when the witness Eustice talked to the defendant Himmelfarb?

Mr. Strong: And Bircher.

The Court: The testimony shows that Eustice's

conversation with the defendant Himmelfarb was prior to the advent upon the scene of Mr. Bircher; prior to Mr. Bircher's conversation with Mr. Himmelfarb.

Mr. Strong: It also shows that Mr. Eustice's position was that of Special Agent, and not connected with that branch.

The Court: Only upon one occasion was the witness Phoebus present with the witness Bircher. That was the bloody runway occasion; the affidavit occasion, isn't that correct?

Mr. Strong: Yes, they were present at the plant on that occasion.

The Court: The witness Phoebus was there?

Mr. Strong: The witness Phoebus was there with the witness Bircher.

The Court: Where in the record is that incident brought up, Mr. Katz, upon which I based my ruling. I am satisfied I am correct about the witness Eustice. I am satisfied I am correct about the witness Phoebus as to his first conversation, on the 23rd of May. I will give consideration to the matter of [1074] reopening the testimony concerning the witness Bircher's conversation.

Mr. Strong: May 23rd is the one on which your Honor did not permit me to give at all. I want also to offer the testimony as to the 23rd, when Phoebus and Bircher were speaking to Mr. Himmelfarb.

The Court: That is the conversation I am now thinking of.

Mr. Strong: Then there was one on the 24th, at the bloody runway. At any rate, I would like to go into all the conversations between the witness Bircher and Mr. Himmelfarb.

The Court: Let me find the transcript. Do you wish to be heard, Mr. Katz?

Mr. Katz: If the Court please, I have been trying to locate that in the transcript.

The Court: On page 1052 the witness Bircher testified—he begins on page 1040. He speaks first of having been assigned to conduct investigations of the income tax of Sam Ormont and Phillip Himmelfarb. On page 1040, on May 23rd, he says he did not warn the defendant Himmelfarb as to his rights. Is that correct?

Mr. Katz: That is correct.

The Court: There is nothing in the record to show that they advised Himmelfarb that they were investigating his income tax.

Mr. Strong: Page 1040. [1075]

The Court: That is what Mr. Bircher was told; not what Mr. Himmelfarb was told. Then, the conversation in the office, at which Himmelfarb was not present, and then, on page 1052:

“There were two portions of the conversation. The first portion was when we first arrived in the yard of the Acme Meat Company, and Mr. Ormont introduced us to Mr. Himmelfarb. We told him who we were, and that we wanted to talk to him regarding his income tax matters, and at that time I asked Mr. Himmelfarb if he was agreeable to discussing mat-

ters with us; and we got into the back seat of Mr. Slick's automobile."

There is nothing more about the conversation with Himmelfarb at that time. Himmelfarb was present when the incident occurred of the affidavit, and there isn't anything more. I don't think that is sufficient, Mr. Strong. I think when Internal Revenue agents go out, it isn't sufficient to just show them their card, and say they are investigating their income tax matters. They have got to warn them. And their testimony is not any evidence at all. Mr. Himmelfarb was never told of the right not to give information, and if he did, it would be used against him. I think that right has got to be preserved.

Mr. Strong: Your Honor does not feel that showing his card is sufficient?

The Court: I don't think it is. Experience teaches us that there are thousands and thousands of investigations, that [1076] are made, that never eventuate in a criminal prosecution, and a man should not presume, just because an Internal Revenue Agent comes to him to seek information that he is going to be prosecuted.

Mr. Strong: The Internal Revenue Agent doesn't know who is going to be prosecuted.

The Court: I know he doesn't. I think he owes a duty, when he is investigating a man's income tax, to warn him; and they talk just as freely if he does.

Mr. Strong: I understand Mr. Himmelfarb was not warned of his rights.

The Court: That is right.

Mr. Strong: Then there is no use to make an offer to introduce the testimony.

The Court: If you wish to make an offer of proof for the record, you may do so.

Mr. Strong: I would like to, if I may.

The Court: Surely.

Mr. Strong: May we have Mr. Bircher state the offer of proof, since he is more familiar with the facts than I am?

The Court: I don't think so. I think we had better keep the United States Attorney, the representative of the Government, who speaks rather than from the witness stand in the court room.

Mr. Strong: I would like to make an offer of proof that if [1077] Mr. Bircher were permitted to testify, and Mr. Phoebus were permitted to testify, as to the conversations between themselves and the defendant Himmelfarb, on May 24, 1945, in the automobile, as was shown before, concerning the income, and income tax return of Mr. Himmelfarb for the year 1944, that they would testify to the effect that Mr. Bircher showed his credentials to Mr. Himmelfarb, and explained to him what his position was, in the discussion with Mr. Himmelfarb; that they then proceeded to ask Mr. Himmelfarb questions, and to receive answers from him, without going into detail as to what was said——

The Court: In substance Himmelfarb said——

Mr. Strong: In substance, Himmelfarb replied, and said the same things, which Mr. Ormont had said, and which was heretofore testified to by Mr. Bircher.

The Court: On the same day, at the agents' office?

Mr. Strong: Yes, your Honor. In fact, what he admitted was that he received this additional money, as he testified with reference to Mr. Ormont, and indicated at that time that this was a practice of collecting extra charges, in addition to the selling price, which was recorded on the invoices, for meat sold by the Acme Meat Company, and that these extra charges were not recorded by either of the defendants——

The Court: Except——

Mr. Strong: Except on this little daily cumulative paper, [1078] showing cumulative amount from day to day, without showing who it was received from, and how much.

Mr. Himmelfarb also was asked whether he had a similar piece of paper to that which Mr. Ormont produced, and Mr. Himmelfarb also produced a piece of paper, which also had cumulative amounts which he admitted were received by him as a part of the extra charges which he shared with Mr. Ormont, and those were received by extra sales of meat the Acme Meat Company made to customers. That this collection was begun some time in May, 1944, and discontinued some time in the latter part of April, 1945. That they regularly divided the receipt of this money, that is, Mr. Ormont and Mr. Himmelfarb regularly divided these extra charges, on a fifty-fifty basis, and they settled together at different intervals of time; sometimes every day, and sometimes possibly at week intervals.

I haven't gone into all the details.

The Court: In substance, that is your offer?

Mr. Strong: And in addition to that an affidavit was prepared for Mr. Himmelfarb's signature, which was worded the same, or almost the same, as that which had been prepared for Mr. Ormont, and as to which there was testimony Mr. Ormont signed; and those disappeared down the bloody spillway. And we have a carbon copy of the affidavit which was prepared for Mr. Himmelfarb's signature. I have it here. I would like to incorporate it as part of the offer of proof. I suppose it will [1079] be rejected as an exhibit.

The Court: If you wish to offer it and have it marked for identification, you may.

Mr. Strong: Yes, your Honor, may I have it marked for identification?

The Clerk: 56.

Mr. Strong: This affidavit was shown to Mr. Himmelfarb, the contents discussed with him, and the facts contained in that affidavit are facts which were relied on——

The Court: The affidavit was not signed?

Mr. Strong: The affidavit was not signed.

The Court: Do you wish to state your objection?

Mr. Katz: At this time the defendant Himmelfarb objects to the offer of proof upon the ground that there has been no foundation laid; that there was not, and has been no testimony by Bircher, or anyone else, that there was any disclosure or statement to the defendant of his constitutional rights, or that he was ever informed that he had a right

to have counsel, or anything else, in connection with it, or whether the statement could or might or could be used against him.

Also, your Honor, in addition to the grounds stated, that there has been no foundation laid for such testimony, I make the objection upon the ground that there is no corpus delicti established. The corpus delicti may not be established by proof of conversations, on the basis of admissions or confessions, and that, in effect, is what is sought to be done here. Also upon the ground that it is incompetent, irrelevant and immaterial; has no bearing upon any of the issues in this case, and further upon the ground that no corpus delicti has been established.

The Court: The objection will be sustained upon the ground that no foundation has been laid. I will not sustain it upon the ground that no corpus delicti has been established. At this time I do not wish to be understood that I am ruling that the corpus delicti has been established. The objection upon the ground that no foundation has been laid is sufficient. Upon that basis it is sustained.

Mr. Strong: I also want, in connection with that offer of proof, to offer two other documents. 54 and 55 for identification I would like to offer in evidence, and I offer 56 in evidence. Those are the two copies of the authoriation and authority.

The Court: 54 is a copy——

Mr. Strong: Of the credentials.

The Court: Of the credentials shown.

Mr. Strong: Yes.

The Court: 55 is not?

Mr. Strong: No.

The Court: 54 is admissible. 55 is not. It is hearsay.

Mr. Katz: As to 54 may I interpose the objection that the [1081] exhibit, as to the defendant Himmelfarb, is hearsay; that there has been no foundation laid. Further, there is no indication here that it was laid.

The Court: I don't know that there was any testimony here that he showed it to Himmelfarb.

Mr. Strong: I will save time by asking questions, if I may.

The Court: I will withhold rulings on the objections then.

Are the preliminary matters over and are we ready to call down the jury?

(Assent.)

Call the jury down. [1082]

(The jury returned to the courtroom at 10:40 o'clock a.m.)

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Robnett: So stipulated.

The Court: Mr. Bircher.

DONALD BIRCHER

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Strong:

Q. Mr. Bircher, on May 24, 1945, as you testified when you were in a car at the Acme Meat Company plant and you spoke to the defendant Himelfarb, did you make any statement to him at that time as to what you were doing? A. Yes.

Q. Will you state what you said?

Mr. Katz: Objected to, if the Court please, no proper foundation laid.

Mr. Strong: The foundation was laid as to who was present the other day, your Honor.

The Court: That foundation is present. I think the question is a little broad. It would permit the witness to make a statement as to what was said, but what you are now [1083] endeavoring to do is establish a foundation?

Mr. Strong: That is all. I don't want the conversation between them, as to the substance.

The Court: Did you ever show him your credentials?

The Witness: Yes, I did.

The Court: You did?

The Witness: Yes.

Q. (By Mr. Strong): I show you Government's Exhibit No. 54 for identification and ask

(Testimony of Donald Bircher.)

you whether that is a copy of the credentials. Do you have the original with you?

A. Yes. (Producing credentials.)

Mr. Katz: Objected to as calling for a conclusion of the witness, if the Court please.

The Court: Overruled.

The Witness: Yes, that is a copy.

Q. (By Mr. Strong): And Government's Exhibit 54, the original of that, was that the document that was shown by you to the defendant Himmelfarb?

A. Yes, that is the one I have in my hand.

Q. Did you read to him the contents of that document? A. No.

Mr. Robnett: I assume this is only being offered as to Mr. Himmelfarb? [1084]

Mr. Strong: At this time.

The Court: Yes.

Q. (By Mr. Strong): Did he take the document from your hands? A. Yes, he took it.

Q. What did he do with it?

A. Read it and looked at it and held it in his hand.

Mr. Katz: I move to strike "he read it" as calling for a conclusion of the witness.

The Court: It may be stricken, that he read it.

Mr. Strong: It is a physical fact.

The Court: How can you tell if anybody is reading it?

Mr. Strong: When somebody stands and looks at a document, he is reading it.

(Testimony of Donald Bircher.)

Mr. Katz: He may be intrigued by the picture on it.

The Court: I took a lot of Japanese documents and looked at them a long time but I wasn't reading them.

Mr. Strong: That is all. I offer in evidence Government's Exhibit 54 for identification.

Mr. Katz: Objected to as immaterial, if the Court please, no foundation laid, incompetent, irrelevant and immaterial, no bearing upon any issue in this case.

The Court: Overruled. Exhibit 54 is admitted in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 54.) [1085]

Mr. Strong: No further questions.

The Court: Cross-examine. Had you cross-examined Mr. Bircher, anybody yet?

Mr. Strong: Nobody has yet, your Honor. I just stopped.

Cross-Examination

By Mr. Robnett:

Q. Mr. Bircher, I understand from you that you had a conversation with the defendant Sam Ormont in this building on May 24, 1945.

A. Yes, sir.

Mr. Katz: If the Court please, I am going to object to this questioning, or further testimony along this line, and ask to have the same under-

(Testimony of Donald Bircher.)

standing with respect to each objection made and the same ruling, if that is agreeable with your Honor.

The Court: The objection to that question is sustained as to the defendant Himmelfarb. It will be deemed that that objection will have been made and the same ruling to each of this line of questioning unless it is otherwise noted or unless counsel calls the matter to my attention so that I may advise the jury with relation to it.

Q. (By Mr. Robnett): And at that conversation there was present Mr. Phoebus, who has already testified here, and a Mr. Schlick, did you say? [1086]

A. Yes, Deputy Collector Walter Schlick.

Q. Mr. Ormont and yourself, constituted all that were present? A. That is correct.

Q. Now at the time the conversation opened you made some statement to Mr. Ormont, you said?

A. Yes.

Q. And at that time Mr. Ormont, before making any statement of anything else asked you, did he not, whether or not anything he might say there would be kept in confidence by you and those present, or words to that effect?

A. Yes, he asked something of that kind.

Q. And didn't he at that time tell you and those present that so far as any income tax was concerned, that he intended to pay whatever he owed or whatever might be bound to be owing?

A. Yes, he said he wanted to straighten it out.

(Testimony of Donald Bircher.)

The Court: Did he say he wanted to straighten it out or did he say he wanted to pay it?

The Witness: He said he wanted to pay, do anything he could to straighten out the matter.

Q. (By Mr. Robnett): He told you, did he not, that the only concern he had, or had ever had with regard to the matters you were about to discuss, were matters in his mind with regard to the [1087] other departments of the Government?

A. No, he did not say that.

Q. But he did tell you, did he not, that that was his chief concern?

A. He said his chief concern was——

Q. Just answer this yes or no, please, and we will get along faster.

Mr. Strong: I submit if he can't answer the question he can explain it.

The Court: He can answer it yes or no and then we can see if he has an explanation.

The Witness: Yes. May I explain it?

Mr. Robnett: No.

The Court: Counsel can pick it up on redirect.

Mr. Strong: May I have the question read, your Honor, so that I will know what to ask?

(The question referred to was read by the reporter as set forth above.)

The Court: That is, other departments of the Government?

Mr. Robnett: Yes.

Q. And he told you at that conference, did he not,

(Testimony of Donald Bircher.)

that the matter he was about to discuss with you all transpired after or commencing with the 1st day of May 1944? A. No.

Q. He did not? [1088] A. No.

Q. Didn't he tell you that was the date when he and Mr. Himmelfarb made their arrangements between themselves as to the so-called extra charges?

A. That is correct.

Q. And he told you, did he not, that that continued from that date until the last of April 1945?

A. He said it continued after that even.

Q. After that? A. That is correct.

Q. And he told you, did he not, that that particular transaction between you and Mr. Himmelfarb was reported by him or being reported that day by him and Mr. Himmelfarb under the fiscal year basis? A. Yes.

Q. By the way, did you thereafter investigate and see Exhibit 6 that is in evidence here? I will get it for you if you are not familiar with it.

A. Yes, I am familiar with it. We didn't investigate his tax liability for 1945 and that pertains to the years 1944 and 1945 where there was an overlap of years on a fiscal basis.

The Court: Did you see Exhibit 6?

The Witness: Yes, I am familiar with it. [1089]

Q. (By Mr. Robnett): And isn't it a fact that he told you that by reason of the fact that the business reported in that fiscal year, on that fiscal year basis, did not begin until May 1944 and that they were adopting a fiscal year for it, that it was not

(Testimony of Donald Bircher.)

reported by him in his individual report for the year 1944? A. No.

Q. He didn't tell you that? A. No.

Q. He did tell you that he didn't report it, or any part of it, in his report for 1944, didn't he?

A. Yes.

Q. He told you that at that time?

A. Yes, that is right.

Q. And he also told you, did he not, that he was paying and intended to pay his tax on that money, that was in the fiscal year, according to the fiscal year? A. No.

Q. He didn't tell you that? A. No.

Q. Did you ever in your examination ascertain that that was done?

A. Yes, at another time.

Q. Now at the time of this conference did you make notes of the conversation? [1090]

A. Yes, I made notes of some of them that I embodied in the affidavit. Those are the only notes I made.

Q. Those are the only ones?

A. That is correct.

Q. And you are testifying here then entirely by memory, are you?

A. Yes, but I would like to explain that which will amplify my answer.

The Court: Go ahead.

The Witness: I am testifying from memory as to what was contained in that affidavit but I used that affidavit in preparing another affidavit, a copy

(Testimony of Donald Bircher.)

of which I have here, although they were not worded absolutely verbatim. In substance they were the same, and I have a copy of the second one.

Q. (By Mr. Robnett): That plus your memory is all that you are using for your testimony, is that correct? A. That is correct.

Q. You haven't gone over this matter with anyone else before testifying?

A. Well, we have discussed it of course at the time and many times since.

Q. Who is we?

A. Mr. Phoebus, Mr. Schlick and I.

Q. And you have discussed it since this trial was in [1091] progress, have you not?

A. Yes, generally.

Q. And you have heard Mr. Phoebus' testimony, have you? A. Yes.

Q. And has that testimony in any way refreshed your memory? A. No.

Q. Not at all? A. None.

Q. You remembered everything that you testified to before you heard Mr. Phoebus' testimony?

A. Yes, that is correct.

Q. And as to your conferences or going over the matter with Mr. Schlick and Mr. Phoebus, the many times you say you have, have any of those conferences refreshed your memory with regard to what transpired in that conference? A. No.

Q. Not a bit? A. No.

Q. You remember everything?

A. Yes. We went over them immediately after and made notes the next day and at that moment

(Testimony of Donald Bircher.)

everything was fresh in my mind, so we had our notes at that time and nothing was added to my memory at that time.

Q. And you have not needed to and haven't, I take it, [1092] gone over the notes that were made after that conference that you have just spoken of?

A. We made some notes the next day and I have reviewed those.

Q. You have reviewed those notes?

A. That is, I have reviewed Mr. Schlick's notes, I have reviewed Mr. Phoebus' notes and we have had general conversations about what was in them.

Q. In the reviews of those notes of Mr. Schlick, did they in any way refresh your memory of anything that happened in that conference?

A. No.

Q. And in your review of the notes of Mr. Phoebus, have they in any way refreshed your memory as to what happened at that conference?

A. No, I think not.

The Court: You made a report on this, did you?

The Witness: Yes.

The Court: A formal typewritten report?

The Witness: Yes.

The Court: To your superiors?

The Witness: Yes.

Q. (By Mr. Robnett): When did you make that?

A. I believe sometime about August 1945, the first one. [1093] Then I made a supplemental one later when they asked that we go into the other

(Testimony of Donald Bircher.)

years with Mr. Ormont, and that required a supplemental report.

Q. Anyhow you made the first report in August 1945?

A. That is my recollection. I would have to look it up.

Q. And in making that report, did you make it entirely from memory? A. No.

Q. What did you use then?

A. I had the deputy collector's report before me.

Q. Whose report is that?

A. Deputy Collector Phoebus and Deputy Collector Schlick. They made a report and I had a copy before me. I also had the notes of the conversations that I have related.

Q. And for that report then you did refresh your memory from the notes and reports of those two gentlemen you just named, Mr. Schlick and Mr. Phoebus, did you?

A. Yes, they handled the accounting matters, being deputy collectors, and from the accounting matters I used their figures and their report but I don't think it refreshed my recollection as to what transpired at these interviews.

Q. You have, have you, Mr. Bircher, a very good recollection of what happened on the 24th and what was said?

A. Yes, I think I have. [1094]

Q. Was there ever a time after the 24th of May 1944 when your recollection of what happened at that conference was not clear?

(Testimony of Donald Bircher.)

A. No, I think not.

Q. Never a time? A. No.

Q. Now I will ask you, didn't Mr. Ormont at that conference tell you that he didn't make the collections of any of this so-called extra money, or whatever it was called? A. No.

Q. He didn't tell you that?

A. He said that Himmelfarb did, that he was out buying in the fields and that on occasions he had to make the collections, but Himmelfarb worked in the cooler and usually made the collections.

Q. He told you, did he not, at that time that all of those so-called extra payments were made at the identical time that the invoices were paid or the purchase of whatever the merchandise was, was paid? A. No, he didn't say that.

Q. He did not?

A. No. He said most of them were. Occasionally people came back and paid the extra charges.

Q. He what?

A. He said most of them were paid at the same time [1095] that the invoices were paid, and occasionally people would come back or come at a different time and pay the overcharges. He said the overcharges were not uniform and they fluctuated with the market.

Q. Just a moment. I didn't ask you that.

Isn't it a fact that he told you at that time that if neither he nor Mr. Himmelfarb made any charges of that kind but that that extra money was some-

(Testimony of Donald Bircher.)

times given them or paid to them, one of them, by the customer?

A. No, he didn't say they didn't make any overcharges. He said they preferred to call it gifts or bonuses but that their overcharges were based on the market.

Q. Didn't he tell you that in many instances customers didn't pay anything extra?

A. Yes, he said that.

Q. And didn't he tell you that they didn't even ask such customers for anything extra?

A. I can't say that. Possibly he did say that.

Q. Well, now, Mr. Bircher, isn't it true that Mr. Ormont told you that many customers, that they had bought meat from them and afterwards, after they had bought and paid for the meat, on another day paid them money gifts?

A. He said they came back and paid extra amounts, but I don't know that he said they were gifts because they were plainly overcharges. [1096]

Q. He didn't say they came back and made a payment of an overcharge, did he, after they paid their first bill?

A. Yes.

Q. He used that expression?

A. He said there was side money, side payments, which he preferred to call bonuses or gifts.

Q. Didn't he tell you that most of the money that they had received had been received from people who voluntarily handed the money to them?

A. No, sir.

Q. He didn't tell you that?

(Testimony of Donald Bircher.)

A. There never was that proposition raised, that it was given voluntarily. [1097]

Q. Did he tell you in that conversation that he didn't believe that this money or a lot of the money was even income or taxable income because it was in the nature of gifts?

A. No. He said it might be gambling; I got a lot of extra money and I don't want to tell you what it is; and later he abandoned the idea of gambling, no longer presented the question that it might be profits from gambling, said it was overcharges, side money.

Q. Said it was overcharges?

A. That is correct.

Q. And he told you they kept no books on it?

A. That is correct.

Q. He told you that it wasn't entered on the books of the Acme Meat Company?

A. That is correct.

Q. Didn't he tell you that it didn't belong to the Acme Meat Company and that is why it wasn't entered on the books?

A. No, he didn't. Do you want me to tell you why he said it wasn't?

Q. Just answer the question. Didn't he tell you that the memoranda he had in the book you have mentioned Friday was the only record he knew of of those collections?

A. No, he didn't say that.

Q. He didn't say that? [1098]

(Testimony of Donald Bircher.)

A. No. He said Himmelfarb had a similar record.

Q. A similar record? A. That is right.

Q. Then he did tell you, did he not, that the record he had in that book and a similar record that Mr. Himmelfarb had were the only records that he knew of of those collections?

A. That is correct.

Q. He readily handed you the book when you asked for it, didn't he? A. No.

Q. He did hand it to you? A. Yes.

Q. And you then made a copy from that book of what it contained on that subject, did you?

A. Yes. As a matter of fact, he held it in his own hand. He didn't hand it to me.

Q. Just a moment. I just wish to have you answer questions.

Now that copy that you made is Exhibit 53, I believe.

(The document referred to was passed to counsel.)

Q. (By Mr. Robnett): I will show you Government's Exhibit 53, which is a small page fastened to this larger page. The small page is the copy that you made from the book he handed you, is it? A. Yes. [1099]

Q. Now, Mr. Bircher, did that contain all that was in the book that he handed you? I mean the page or whatever you were copying from.

A. Yes. In addition there are some notes that

(Testimony of Donald Bircher.)

the book was gold fabric, or gold paper covered book, and approximately the size of the book, and that is a page from the book.

Q. Now you are referring——

The Court: You mean there were notes in the book?

The Witness: No. We made a little memorandum at the top of this page saying that it was taken from a gold fabric covered book.

Q. (By Mr. Robnett): Just read the part of the memoranda that was not in the book.

A. It says, "Gold notebook, 11½ inches by 21½ inches," I guess it is.

Q. You wrote that, did you?

A. No, I think that is Mr. Phoebus' handwriting. He was there present.

Q. Those two first lines on there in any event, those were not in the book?

A. That is correct.

Q. But all the rest was?

A. Yes, except the dots, those four dots after the [1100] amounts. Otherwise, it is exactly the same as the book.

Q. And that contains all that was on the page you were copying from?

A. That is correct. There were no dollar signs on the figures, as you can see, but just the dates and the amounts.

Q. I mean, this is an exact copy of all that is on that page?

A. That is correct.

(Testimony of Donald Bircher.)

Q. And he told you that that page was the only record he had, didn't he? A. Yes.

Q. And he told you that early in the conversation, did he not?

A. Yes. I don't know whether it is early or in the middle of it.

Q. Well, as you related the conversation the other day, was that the chronology of it?

A. Yes.

Q. Now as you related the conversation the other day, there was very little, if anything, said by anyone in that conference but by Mr. Ormont. Was that the way that the conference was held and what happened there?

A. I asked most of the questions, he made most of the answers, did most of the talking.

Q. Did you ask him questions? [1101]

A. Yes.

Q. You didn't give them the other day, you gave just one or two. A. That is correct.

Q. You were asked to give the conversation but you didn't give the questions or what you said, did you? A. No, not all of them.

Q. You were only giving what you remembered Mr. Ormont saying. That was chiefly what you were doing? A. I believe so.

Q. He told you, did he not, that you could have free access to all the books and records of the Acme Meat Company? A. Yes.

Q. And was that before or after you had made the copy, Exhibit 53?

(Testimony of Donald Bircher.)

A. Both before and after.

Q. And he told you, did he not, that he and Mr. Himmelfarb considered and treated this arrangement on these collections as a joint venture?

A. No, he didn't say that.

Q. He didn't mention joint venture at all?

A. Yes, he did mention joint venture, but he didn't say that they treated it as that. It was a different explanation.

Q. He said, did he not, that it was similar to a joint venture? [1102]

A. Are you talking about overcharges or the Acme Meat Company or both?

Q. No, I am talking about the so-called collection, whether they are overcharges or not, not the business of the Acme Meat Company, but this business between he and Mr. Himmelfarb on this fiscal year matter.

A. He didn't differentiate between the business of the Acme Meat Company and their overcharge collections; he merely said that in the Acme Meat Company they were to share their profits equally after the first \$24,000, after which the legitimate profits of the business were to go to Mr. Ormont; that in addition they had this side venture of collecting overcharges and they would share 50-50 on those.

Q. He did say that this was a side venture, didn't he?

A. No, it was all part of the same business.

Q. Just a moment. Will you answer it yes or no?

A. No, he didn't say that.

(Testimony of Donald Bircher.)

Q. He didn't? A. No.

The Court: Read the witness' last answer.

(The answer referred to was read by the reporter, as follows

("A. He didn't differentiate between the business of the Acme Meat Company and their overcharge collections; he merely [1103] said that in the Acme Meat Company they were to share their profits equally after the first \$24,000, after which the legitimate profits of the business were to go to Mr. Ormont; that in addition they had this side venture of collecting overcharges and they would share 50-50 on those.")

Q. (By Mr. Robnett): Do you remember giving that statement?

A. Yes. That doesn't explain it entirely, I don't believe, the answer.

The Court: Did he tell you it was a side venture?

The Witness: He said it was part of the same venture but part of their joint enterprises to run the Acme Meat Company and to have these extra activities of collecting overcharges. I don't think he drew any line between the two. It was all part of their joint business venture, the Acme Meat Company venture.

Q. (By Mr. Robnett): He did say what you just testified to a moment ago?

A. Just as I have indicated and explained.

(Testimony of Donald Bircher.)

Q. All right. Now he told you, did he not, that in the matter of this side venture, that what they collected, he or Mr. Himmelfarb collected, depended entirely on the willingness of the customer? Answer that yes or no. A. No.

Q. He did tell you that it was according to the willingness [1104] of the customer, didn't he?

A. No.

Q. He never mentioned that? A. No.

Q. Never said anything about the willingness of the customers to pay?

A. No, sir. He said, according to the market, whatever the market was, how much he could get from the customers.

Q. He did tell you, didn't he, that the question of collection of those extra charges was how much the customers were willing to pay on the side?

A. No.

Q. He never said that? A. No.

Q. When you were testifying Friday you aimed to give us accurately according to your memory what was said, didn't you? A. Yes.

Q. You knew then, did you not, that Mr. Ormont was on trial here in a criminal case?

Mr. Strong: I object to that.

The Witness: Yes.

Mr. Strong: He knows, everybody knows. It is no secret.

Q. (By Mr. Robnett): Now I am going to ask you to look at your testimony [1105] that you gave

Friday, page 1045, and ask you to look at lines 14 to 17.

A. (Examining transcript)

Q. Start with line 11 to 17. A. Yes.

Q. Did you give that testimony? A. Yes.

Mr. Strong: So stipulated.

Q. (By Mr. Robnett): And in that testimony on Friday you said:

“He said that the side charges or collections from the customers of the Acme Meat Company had not been uniform, had not been determined on the basis of so much per pound, that the overcharges or excess charges which had not been recorded in their books or records fluctuated and determined on the market how much the customers were willing to pay on the side.”

A. Yes, that is correct.

Q. Now in his conference with you gentlemen he told you, did he not, that the only thing he would ask of you was that you not divulge anything he told you because it might embarrass him with other departments?

A. I don't understand that question.

Mr. Strong: That has been asked and answered.

The Court: Yes, it has been asked and answered. [1106]

Mr. Robnett: What was that?

The Court: I think that question was asked earlier this morning by you.

Mr. Robnett: Very well.

(Testimony of Donald Bircher.)

Q. Isn't it true that in his statement at that conference he used the expression, with regard to these collections, that they were merely unrecorded collections?

A. No.

Q. He never used the expression "unrecorded collections"?

A. Yes. That is one of the words he used. That isn't the only word he used to describe that.

Q. He did use that?

A. Yes.

Q. And he referred to the collections in general as unrecorded collections, didn't he?

A. He said they were side money payments received.

Q. Just answer my question, please.

I move to strike out the answer as not responsive.

The Court: He answered it yes.

Mr. Strong: May he explain? It sounds like he wants to explain it.

The Court: No, he has explained it. It is just a repetition.

Q. (By Mr. Robnett): Didn't he tell you at that time [1107] that sometimes those side payments were made by checks?

A. Yes, sir.

Q. Now you testified with regard to a conversation you had with the defendant at the bank the time you took a list of bonds. Do you recall that conversation?

A. Yes.

Q. There was present at that conversation who?

A. Mr. Ormont, his accountant Mr. Malin, Deputy Collector Phoebus and myself.

Q. Now you said at that time that the defendant

(Testimony of Donald Bircher.)

made a statement to you about having invested this extra money in government bonds. A. Yes.

Q. Was that before or after you had checked the list of bonds? A. That was after.

Q. After you had checked it?

A. Yes, in front of the bank.

Q. And you had examined the bonds, had you, while they were checking them? A. Yes.

Q. You looked at them and the face of them and the dates of them?

A. I didn't handle them, I stood over the accountant who worked in front of me. Mr. Ormont and I stood over him [1108] and watched him to see that he got the right numbers down and the detail.

Q. And he took the dates down? A. Yes.

Q. And you noticed him putting the dates down?

A. Yes.

Q. Did you observe the dates?

A. Yes, I observed principally the payee and the number of the bond, the denomination, the amount.

Q. But I am asking if you observed the dates of the bonds. A. I don't recall it in detail.

Q. In making up the list, did they list them according to years that they were purchased or as they were dated?

A. He listed them the way they come out of the box, one and then the next, regardless of dates.

Q. Now he had previously told you, you say, that he had collected from these side moneys about \$35,000 or \$36,000, had he? A. Yes.

(Testimony of Donald Bircher.)

Q. And did he tell you at that time that he had put that money into government bonds?

A. He said that he put most of his money payments, receipts, into government bonds, and that he also put other funds that he had accumulated in prior years from savings [1109] into government bonds. He had about \$100,000, about \$96,000 of cost of bonds in his box.

The Court: You mean he told you that before he went out there, that he had about \$96,000 in bonds?

The Witness: No, that is after we inventoried the box, added them up.

The Court: His question was whether or not he told you before you went out there that he had put his side money into bonds.

The Witness: No, he didn't tell us that.

Q. (By Mr. Robnett): This happened out there after you had checked the bonds?

A. That is right.

Q. He told you at that time also, you say, that he had accumulation of savings over a course of years and he had invested that in bonds, didn't he?

A. Yes.

Q. And isn't it true now, Mr. Bircher, that at that time instead of Mr. Ormont telling you had invested this side money in bonds, that it was Mr. Malin that told you, "Well, at least the man has been patriotic, he has invested his money in government bonds," or words to that effect?

A. No, that is not right. Mr. Ormont explained that to me with some emphasis. [1110]

(Testimony of Donald Bircher.)

Q. He did? A. Yes.

Q. He is the one? A. Yes.

Q. And were these parties all present when he did that?

A. Mr. Ormont and I were standing aside, he was telling me something about his physical prowess——

Q. Just a moment. A. We were alone.

Q. I asked you, was there anyone else present besides you and Mr. Ormont when that was said.

A. We were standing together——

The Court: No, wait a minute.

The Witness: No.

The Court: All right.

Q. (By Mr. Robnett): What was that?

A. No. The others were five feet away or three feet away.

Q. Were you in the same room?

A. We were standing out on the sidewalk in front of the bank.

Q. Were the others that you say were there, were they outside or inside?

A. They were outside for the most part, one of them [1111] might have been just coming out, I don't remember, but there were others standing within a few feet of us, and Mr. Ormont told me that when we were just together. The others were two or three feet away.

Q. Mr. Ormont did not in any of those conferences or conversations tell you that he—withdraw that.

(Testimony of Donald Bircher.)

Let me ask you, Mr. Bircher: You have not been very friendly to Mr. Ormont since about the 24th or 25th day of May, 1945, have you? Will you answer that yes or no, please? A. Yes.

Q. You have been just as friendly as you were before that?

A. Yes, indifferent, I would say. I mean I don't hold any grudge. This is just my work. It doesn't mean anything to me, the fact that we had an argument. [1112]

Q. I will ask you if on the 24th day of May, 1945 down at the plant, if you didn't tell Mr. Ormont, in words and effect, "I will get you for this," or something to that effect? A. Certainly not.

Q. You didn't say anything of that sort?

A. No, sir; never.

Mr. Robnett: That is all. Thank you.

The Court: Mr. Katz?

Mr. Katz: No questions, if the Court please.

The Court: Redirect?

Mr. Strong: Just one question.

Redirect Examination

By Mr. Strong:

Q. With reference to the conversation that Mr. Robnett asked you about concerning a statement purported to have been made by Mr. Ormont as to what his chief concern was in reporting the money, and you answered yes, and his Honor said you could explain on redirect, would you please explain what was said?

(Testimony of Donald Bircher.)

Mr. Robnett: I object to that on the ground it has been asked and answered, not proper redirect examination.

The Court: I think that is pretty broad.

Q. (By Mr. Strong): State what was said with reference to that. [1113]

A. Mr. Ormont said——

Mr. Robnett: Just a moment. I object to that. I don't believe it is redirect. It is an improper question, incompetent, irrelevant and immaterial. It has been asked and answered on direct as well as on cross.

The Court: He was asked on direct what the conversation was, you asked him on cross whether he didn't say such-and-such in addition to what he said, and he said yes. Therefore that is new matter that was brought out on cross-examination.

If you can remember what the question is, or what the conversation was he is talking about, you can answer it.

Mr. Strong: The only one I want to know is where his Honor said I could ask you on redirect.

The Court: Go ahead.

The Witness: Mr. Ormont said that his principal concern was with the thought that the Government might cancel the license of the Acme Meat Company.

Mr. Robnett: He has already testified to that.

The Court: He already testified to that on direct. He went all over that about the license of

(Testimony of Donald Bircher.)

the Acme Meat Company, subsidies, and so forth. If that is the explanation, he has already given that.

Q. (By Mr. Strong): You have already given that? A. Yes. [1114]

Mr. Strong: That is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Strong: At this time, your Honor, I would like to offer in evidence Government's Exhibit 40-B for identification, which is the verbatim transcript of the Acme Meat Company records. I won't go into what it says.

Mr. Katz: If the Court please, that is objected to. There has been no foundation laid for it; it is hearsay, incompetent, irrelevant and immaterial, no basis for its admission as to any issue in this case.

The Court: Let me see Exhibit 50 and 51.

(The documents referred to were passed to the Court.)

The Court: I do not believe there has been sufficient foundation laid for this.

Mr. Strong: Shall I argue it or is prior argument sufficient? It is the same argument.

The Court: Same ruling. Objection sustained.

Mr. Strong: I offer in evidence Government's Exhibits 46 and 47, which are the comparative statements of net worth.

The Court: The objection is sustained as to the

defendant Himmelfarb. This is, however, admissible against the defendant Ormont.

Mr. Robnett: I would object to it, if the Court please, as [1115] hearsay, incompetent, irrelevant and immaterial, no foundation laid for its admission as to Mr. Ormont.

The Court: Let me think about it. You offer 46 and 47?

Mr. Strong: Yes, your Honor. That is the summaries.

The Court: Any objection?

Mr. Robnett: Yes, there will be.

Mr. Katz: I don't know which summaries he is referring to.

The Court: These are as to both.

Mr. Strong: May we separate them?

The Court: No. 46 is Sam Ormont, but there is one page on that that I do not think belongs in that file. It is a different year.

Mr. Strong: May I remove it physically?

No. 47 is now only Sam Ormont. I offer it as to both all the time now.

Mr. Robnett: May I see them?

The Court: Yes. These are the documents counsel handed out at the beginning of the trial in order to follow the testimony of the witness Eustice.

Mr. Katz: As to the defendant Himmelfarb, we object to them on the ground it is hearsay, no foundation laid, not within the issues.

The Court: I will reserve the ruling on that objection.

Do you have any other witnesses? [1116]

Mr. Strong: No, unless some of these documents go in. I should say this, if some of these documents go in then I will have witnesses.

The Court: I see.

Mr. Strong: What about 40-B, your Honor? Was that in as to the defendant Himmelfarb or as to Ormont only?

The Court: I hadn't ruled on that. I sustained the objection as to Himmelfarb, and Mr. Robnett made the objection that there was no foundation laid, and I was trying to recall the testimony concerning that foundation as to that document.

Mr. Strong: I will withdraw the offer as to Ormont just to save time.

The Court: Very well.

Mr. Robnett: Now as to Exhibit 46, if the Court please, I object to this on the ground that it is incompetent, irrelevant and immaterial, and it is hearsay as to this defendant and is a mere self-serving declaration by the witness for the prosecution and is in no way binding upon the defendant, and that no proper foundation has been laid for its admission. It purportedly would be from books and records that are not in evidence and they would be the best records of what they contained, and they couldn't make it up without the use of them. They are not in evidence in this case. And the other records and things from which they were made, according to the witness Eustice, was hearsay as to him and incompetent, irrelevant and immaterial as to this defendant and hearsay as to this [1117] defendant.

I would like to interpose the same objection that I have just made to Exhibit 46, to Exhibit 47.

The Court: Those two documents are compilations made by the witness Eustice in support of the Government's contentions as to the amount of tax. I am familiar with the case, *United States v Schenek*, in the Second Circuit which sustained the admissibility of such documents.

Mr. Strong: Also the Vomansky case and a large number of others?

The Court: That is the leading case on the subject.

Mr. Strong: Yes.

The Court: The Ninth Circuit, however, has not yet said it is. I do not think it is good law. It is really argument. I think all of the objections which counsel made are good as against it. I think if it goes into the record it is highly prejudicial of the defendant's rights, and also it would be conducive to an improper verdict because the burden on the Government is not to establish those precise amounts and those precise classifications, and in my judgment it might divert the jury from an appropriate verdict of guilty, should one be indicated in the case, because they might not agree with some of the figures.

The objection is sustained.

Mr. Strong: I don't suppose there will be any point to [1118] my offering argument on a legal basis since your Honor has indicated you are familiar with the cases?

The Court: I am pretty familiar with the cases

and their logic and their reasoning, and until the Ninth Circuit tells me I have to admit that kind of evidence I am not going to admit it.

Mr. Strong: I offer in evidence Government's Exhibit 36-B, which is a transcript of the bank account of Phillip Himmelfarb; also Government's Exhibit 36-C for identification, also a transcript of the bank account of Phillip Himmelfarb.

Mr. Robnett: As to Mr. Ormont, I want to object to both of them as hearsay, incompetent, irrelevant and immaterial, if the Court please, not binding on him, and that they are seeking outside hearsay testimony.

The Court: Mr. Strong, are these all of the exhibits which you have had marked for identification relating to the defendant Himmelfarb?

Mr. Strong: These are the only ones not admitted in evidence.

The Court: You will have a motion to make concerning all of the evidence that has been excluded, I take it?

Mr. Strong: Yes, your Honor. That hasn't been excluded; it hasn't been offered so it hasn't been excluded.

The Court: I mean all of the evidence which was excluded as to the defendant Himmelfarb. [1119]

Mr. Strong: I will take that up next.

The Court: I was thinking, that being the case I would like to hear some argument in connection with the matter from both sides, so I will reserve my ruling on these two exhibits, and excuse the jury until 2:00 o'clock, and hear your motion.

Mr. Strong: May we have a recess now?

The Court: Very well. The jury are excused until 2:00 o'clock.

(The jury retired from the courtroom at 11:35 o'clock a.m.)

(Short recess.) [1120]

Mr. Strong: At this time, I would like to make a motion to apply to all the testimony given on this trial with reference to the income, and returns, for the year 1944; apply that testimony to the defendant Himmelfarb, whether that testimony was given in the presence of Mr. Himmelfarb, that is, whether statements and acts took place in the presence of the defendant Himmelfarb, or out of his presence.

In that connection I want to point out these facts: The indictment, as to 1944, contains two counts, Count 1 and Count 2. In Count 1 it is charged that both defendants violated the law with reference to the income tax return for 1944 of Sam Ormont. Count 2 charges that both defendants violated the law, as there stated in the indictment, as to the income tax and return for the year 1944 of the defendant Himmelfarb.

In effect, as to each of these counts, it is charged that they operated together, and that is practically the same as alleging a conspiracy. In other words, it is a scheme in operation between two parties to produce a result with reference to the income tax return for each one of the two for that year.

The Court: A scheme is not alleged, however. It seems to me, the first thing to be determined is as

to whether or not the evidence is admissible as against the defendant Himmelfarb at this time. There is evidence in the record which the Circuit Court characterizes as substantial evidence, [1121] from which a jury of reasonable men and women, could conclude, beyond a reasonable doubt, that Phillip Himmelfarb—no, I don't think it goes that far. I think, if there is some evidence in the record there would be *corpus delicti*, because the standard I have just announced is the standard I must apply upon a motion for a judgment of acquittal. Is there some evidence in the record from which it could be said that Phillip Himmelfarb committed the acts alleged in Count 1 and in Count 2?

Mr. Strong: In that connection I will point out this evidence, your Honor: First of all there is the calendar year return filed by the defendant Phillip Himmelfarb, which is Government's Exhibit 4, which purports to show the entire income for the year 1944, and it purports to show the tax.

There is also here the return of his wife, Ruth Himmelfarb, showing her distributable share of the community income, and the amount of money shown as tax as to her. That shows a sum for the defendant Phillip Himmelfarb of approximately four thousand and some odd dollars—less than five thousand dollars. Then there is in evidence Government's Exhibit 6, which is a return filed by the defendant, and showing on its face that it covers a period from May 1st, 1944, to April 30, 1945. On its face it shows that it covers a period of eight months in 1944. On its face it shows that the addi-

tional money received as income by the defendants Sam Ormont and Phillip Himmelfarb, jointly, in this operation was seventy-one [1122] odd thousand dollars. And it also shows on its face that 50 per cent of that money went to the defendant Himmelfarb—the sum of \$35,694.32.

So we have in evidence, just on the basis of two returns, a certain amount reported in 1944, for the calendar year, and the return subsequently filed of the so-called fiscal year return, showing simple income of more than \$35,000 for the defendant Phillip Himmelfarb. I think those two documents, in view of the fact——

The Court: Yes, I think that the returns of 1944, filed by Himmelfarb, and the joint venture return, Exhibit 6, are sufficient, together with the letter signed by Himmelfarb, Exhibit 50-A, B, C and D—or is it 51?

Mr. Strong: The letter as to Himmelfarb is 50-A, B, C and D. The letter, or statement signed by him.

The Court: They are all part of the same letter, because the testimony was that they were all received at the same time, and together.

Mr. Strong: Yes.

The Court: I hold there was sufficient foundation to admit the letter, and I think the three of them together would be sufficient, unless Mr. Katz can convince me otherwise. That is, on Count 2. That's the income tax return of Phillip Himmelfarb.

Mr. Strong: That's right, your Honor. [1123]

The Court: On Count 1, I don't think there is sufficient evidence to grant your motion with relation to the defendant Himmelfarb.

Mr. Strong: As to Count 2, I want to point out just one further item. There is definite testimony that the defendant Phillip Himmelfarb held himself out as a partner in the Acme Meat Company.

The Court: That is on Count 2?

Mr. Strong: That is on Count 2, yes.

The Court: On Count 1, I don't think I can admit the testimony in the case concerning the defendant Phillip Himmelfarb. There is not anything to show in Count 1 that the defendant Phillip Himmelfarb had anything to do with Ormont's return for 1944; that is, his failure to return.

Mr. Strong: That part is covered in the offer of proof, which your Honor has rejected.

The Court: Yes.

Mr. Katz: If the Court please, I believe that the only matter we need address ourselves to here is in Count 2; as has been pointed out by your Honor, there is no evidence with which to connect the defendant Himmelfarb with the preparation of the Ormont return; nothing to show he had anything whatsoever to do with it.

With respect to Count 2, and with respect to this motion, I take it that it is obvious that in determining the motion, [1124] the only evidence that may be considered is that which is in the record as against the defendant Himmelfarb, and that we cannot take into consideration any evidence that

is in the record against the defendant Ormont in submitting the motion.

First and foremost I wish to point out to the Court that in respect to the matter of the admission of evidence received against one defendant, which is sought subsequently to be applied against another defendant, that that cannot be done for a number of reasons: First, the defendant Himmelfarb had a right to object to each question and answer asked of and made by the witness, upon which such evidence was excluded. To attempt to apply evidence which was excluded on the basis of a given objection would deprive the defendant of that right to exclude it upon such other ground as may exist therefor, which were not made, and could not have been made, because it had been excluded upon another valid ground.

Secondly, that Himmelfarb has the right to cross-examine each witness.

The Court: You may have that right now.

Mr. Katz: If the motion granted?

The Court: In the granting of the motion, you are entitled to call witnesses back and cross-examine them.

Mr. Katz: Because, until such time, there was not any evidence before the Court with respect to which any cross-examination could be had. [1125]

The Court: And, so far as your objections are concerned, your objection was broad enough to cover any which might have existed. In other words, you did not base your objection solely upon the ground that no foundation was laid. You included the ob-

jections that it was incompetent, irrelevant and immaterial, hearsay, and so forth. And I tried to make my rulings to make it clear that upon each occasion, where I sustained an objection, that I sustained it only upon the ground that no foundation had been laid.

Mr. Katz: Yes, I appreciate that.

The Court: So that took the other objections as overruled—the other grounds of objection, except in one specific instance, where I indicated this morning I was not ruling on the rest of them.

Mr. Katz: I have in mind this, your Honor: Where a particular line of testimony has been ruled out, as against a defendant, that subsequent questioning on this line—as a matter of fact, some of the evidence was not offered at the time against the defendant—that the particular questions that were then being asked, insofar as being objectionable, on other grounds, were no longer matters of concern to the defendant Himmelfarb, for the reason that they were not being offered as against him, but were being excluded by reason of the ruling.

The Court: I think it was obvious that why counsel was [1126] not then offering them was to save the time of the objection. In other words, he recognized the ruling which I had made, that there was no foundation established, and rather than offer them and possibly prejudice your client in front of the jury as to each offer against him, he abided the ruling of the Court, and I think the record of the trial will show—I don't think the jury could possibly get the idea that he did not intend

that they should not apply to the defendant Himmelfarb, for the reason that he stated that at the appropriate time he would ask that all the testimony——

Mr. Katz: My objection is not that it was not offered against the defendant Himmelfarb with the intention not to apply; my objection is that it was not offered against him, and because the particular matter was not offered, it is not of concern, and that the defendant could not properly object to the particular question, because it was not offered against him, even though a valid ground for objection might have existed as to him. I have made it, and it certainly did exist, and I take the same view with respect to the line of testimony which was excluded, where the questioning continued against a particular defendant. I believe the questions were objectionable, but no objection was interposed on behalf of the defendant Himmelfarb, because the evidence was being excluded against him, by reason of the objection having been made at the outset. [1127]

There is only one other thing of concern, and that is, if the Court please, the matter of applying testimony that came in as against one defendant to another. I have pointed out to your Honor that it is necessary for the Government making such motion, to specifically point out and designate which portion of the record, which portion of the witness' testimony, is sought to be elicited, because even though it might be, which is not my position—my position is it all should be excluded—but, even if we assume that part of it can properly be applied,

there is still parts and portions of the testimony which cannot in any event be applied.

The Court: As for instance?

Mr. Katz: As, for instance, the matter of the testimony of the witness Eustice, based upon working papers, which were not prepared in part by him, but in part by someone else. They were proven in this court room to have been inaccurate, based upon hearsay, based in part upon examination of documents, and papers, not in evidence before this Court, and that that examination included matters dehors the record. That in addition to those facts with respect to the working papers, they were based upon assumptions, based upon speculation, based upon guess, and were not admissible, in my opinion, in the face of an objection properly made.

The Court: Which papers are not in evidence?

Mr. Katz: The testimony is, your Honor. [1128]

The Court: The testimony was used to refresh his recollection. As a matter of fact, the Government could not offer working papers in evidence, under the rule.

Mr. Katz: It was strictly hearsay, and as to none of these matters could his recollection be refreshed, because he had no original knowledge with respect to them. So in my opinion it is not correct, nor is it accurate, nor is it proper, to state, with reference to testimony such as the witness gave from the working papers, that these were not admitted into evidence. Actually the result was that there was indirectly presented into evidence, if I may use the word, under the guise of being his working papers

used to refresh his recollection, that which could not refresh his recollection, except as to part of it.

The Court: In counsel's motion I think he probably neglected to specify it, but by virtue of the allegations in the indictment, a motion can be made to include only the testimony of the witness relating to 1944, concerning Phillip Himmelfarb?

Mr. Strong: I so said, your Honor. I limited it.

The Court: It is only that testimony. It is not the testimony of Eustice, or any other witness, concerning 1942 and 1943; it is only the testimony of the witness that applies to Himmelfarb's return; not to Ormont's return, for 1944.

I have indicated I will deny that motion, so it is only [1129] that testimony in the record given by a witness concerning Himmelfarb's 1944 return that is admitted.

Obviously, the testimony of any witness concerning Sam Ormont in 1942 and 1943, not only concerns his actual acts and conduct, but his state of mind, to-wit: His wilfulness, and cannot be applied to the defendant Himmelfarb, and an appropriate instruction should be prepared to advise the jury, because you have the defendants charged in some counts, but not in others.

Mr. Katz: As to this, the very question and point I am trying to make, is this: In order to apply such testimony it is first necessary that we differentiate and distinguish evidence that came in with respect to 1942 and 1943 from matters that came into 1944. And further it is necessary to take as to 1944, the testimony of Eustice.

The Court: But not as to the defendant Himmelfarb.

Mr. Katz: He did not testify as to the defendant Himmelfarb.

The Court: As to prior to 1944?

Mr. Katz: He did not testify as against the defendant Himmelfarb in 1944 either. Neither did the witness Phoebus.

The Court: I guess that is right.

Mr. Katz: Neither did the witness Bircher; neither did the witness Link; neither did any of the witnesses in this case, if the Court please, and that is the point I am trying [1130] to make.

If your Honor were to say we will apply the testimony that came in, it can't be testimony which came in against Himmelfarb, because it is already in against him. If the testimony came in against Ormont, you won't apply that against Himmelfarb. I think the Court would want to know what evidence is going to be so applied.

The Court: Yes, I am inclined to think counsel ought to specify the particular testimony. Or did you make your motion as to all of the testimony, Mr. Strong?

Mr. Strong: I move that all of the testimony with reference to the income for the year 1944—

The Court: That is, all testimony relating to the conduct of Sam Ormont and Phillip Himmelfarb to the year 1944.

Mr. Strong: Yes, because they are jointly charged in that count. I think it should be left. The

jury should decide whether that conduct and testimony demonstrated violation by one or both or neither.

The Court: It looks to me like there is no sufficient testimony to connect Sam Ormont with Count 2. In other words, if the defendant would make a motion for judgment of acquittal as to Sam Ormont, as to Count 2, I think I would have to grant it. As to the defendant Himmelfarb for 1944, as to Count 1, that again is another subject which counsel will probably move on, and we will have to discuss it. But as to Count 2, I [1131] don't see any testimony in the records that connects it.

Mr. Strong: May I point out that the count relates to the income of both. Count 1 relates to the income of the defendant Ormont.

The Court: Let us talk about Count 2.

Mr. Strong: Count 2 relates to the income tax return of Himmelfarb, and his income. The testimony as to conversations between the agent Phoebe, and the agent Bircher, as to earnings during 1944 by Ormont and Himmelfarb, operating, as they claim under their own signature, in Government's Exhibit No. 6, was a joint venture, or any other which they operated—the joint earnings,—that testimony tends to show whether or not the income tax return styled by Phillip Himmelfarb for the calendar year 1944 relates all to his income for that year, or does not.

If Mr Ormont admitted they had a joint venture, a joint enterprise, and both together collected and split the profits of \$70,000 over and above the

amount Mr. Ormont and Mr. Himmelfarb each reported, that, I submit, is evidence which goes to show whether or not there was additional income which they were seeking to keep from the Government. Therefore, the admission of Ormont to either one of the agents as to what the income was which was subsequently distributed——

The Court: Except for the return, Exhibit 6, it seems to me it would all be hearsay, as far as Himmelfarb is concerned. [1132]

Mr. Katz: It is not in the record against us.

Mr. Strong: I am offering it now in support of this motion.

Mr. Katz: What is being done, he is using testimony offered as against Ormont, and not in as against Himmelfarb, as the basis for getting it in. In other words, first he applies it against Himmelfarb, but he can't do that.

Mr. Strong: I am not doing that. Government's Exhibit 6 is signed by the two defendants, and shows that they got \$70,000 more, and that they split the \$70,000, this shows, at least 8/12ths of the \$70,000 was earned before 1944.

The Court: But that does not show, Mr. Strong, that the defendant Sam Ormont wilfully aided or abetted or caused the defendant Phillip Himmelfarb not to report it in that year.

Mr. Strong: Let us forget Sam Ormont in Count 2. I want to apply it to Phillip Himmelfarb.

The Court: I jumped from Himmelfarb to Ormont for the purpose of illustrating the point I was making.

Mr. Strong: This is a joint return, and they both signed it, and by that they can infer further that the joint operation, since it is signed by both, at the same time, and since Mr. Malin testified they did not come to him until the 21st of May, which is at least three days after the conversation——

Mr. Katz: He is bringing in the testimony in the record only against Ormont. [1133]

Mr. Strong: Exhibits 50 and 51 are the same. They are worded almost exactly in the same words, and I think from that it follows that both have the same explanation; they both explain the same information, and say we both at the same place, on the same date had a part in the same transaction, and all that, taken together with the fact that they reported the joint income, is enough for the jury to infer beyond a reasonable doubt that the two defendants were operating in conjunction. [1134]

The Court: If that is the case then we do not need the rest of the testimony admitted as against Himmelfarb to prove your case. I think you probably had better come back then at 2:00 o'clock with some analysis of the testimony and point it out to me more strongly, each of you, and at that time I suppose you will rest, or do you have other witnesses?

Mr. Strong: Well, I am not going to try to re-offer what I have offered, so I probably will rest at that time, your Honor.

The Court: Well, at that time I suppose defense counsel will want to offer their motion for judgment of acquittal.

Mr. Robnett: Yes.

The Court: And argument?

Mr. Robnett: Yes.

The Court: Very well. We will recess until 2:00 o'clock.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [1135]

Los Angeles, California, June 10, 1947

2:00 o'Clock P.M.

(The following proceedings were had outside the presence of the jury:)

The Court: The defendants are present and are ready to proceed in United States vs. Ormott?

Mr. Strong: Yes, your Honor.

Mr. Robnett: So stipulated.

The Court: Mr. Strong.

Mr. Strong: With reference to the specific evidence which we now request your Honor to apply——

The Court: Incidentally, I will deny your motion to apply all of the evidence.

Mr. Strong: Yes. I thought that was what was happening.

The Court: That is as to the defendant Phillip Himmelfarb.

Mr. Strong: May I read these off, your Honor, and then we can take them up if you desire one by one?

The Court: The volume and page?

Mr. Strong: Yes, sir.

Page 902, lines 19 to 23 inclusive.

Page 904, lines 9 to 10 inclusive, and line 13 to the end of the page.

Page 905, line 1, line 9 to the end of the page.

Page 906, [1136] line 1 through line 8 inclusive, line 10 to the end of the page.

Page 908, line 20 to the end of the page.

Page 909, the entire page.

Page 910, the entire page; that is, from line 21 inclusive.

Page 911, lines 5 to 10 inclusive.

Page 913, lines 12 to 17 inclusive.

Page 914, lines 10 to 13 inclusive.

Page 916, lines 6 to 14 inclusive, lines 22 to the end of the page.

Page 917, the entire page up to line 17.

Page 918, lines 2 to 6 inclusive, lines 9 to 11 inclusive.

Page 919, lines 1 to 16 inclusive.

Page 920, the entire page.

Page 921, lines 1 to 8 inclusive, lines 11 to 15 inclusive, lines 20 to the end of the page.

Page 922, lines 1 through line 9, lines 18 and 19.

Page 923, lines 6 and 7, lines 12 to 15 inclusive.

Page 924, lines 1 to line 24 inclusive.

Page 925, lines 18 to the end of the page.

Page 926, lines 1 to line 15 inclusive, line 25.

Page 927, the entire page.

Page 928, lines 1 through line 13 inclusive, line 19 to [1137] the end of the page.

Page 929, from line 1 to line 9 inclusive, line 22 to the end of the page.

Page 930, the entire page.

That is the testimony of the witness Phoebus.

Now the testimony of the witness Bircher, page 1042, line 3 to line 3 to line 16 inclusive, lines 20 to 22 inclusive.

Page 1043, the entire page with the exception of the first two lines.

Page 1044, the entire page.

Page 1045, the entire page. [1138]

1046, the entire page;

1047, line 1 to line 11, inclusive;

Line 17 to the bottom of the page.

1048, the entire page;

1049, the entire page;

1050, the entire page, except line 25.

The Court: What you are doing is offering all of Bircher's testimony?

Mr. Strong: That's right to page 1057 inclusive.

Then page 1061, lines 10 to 12, inclusive.

The Court: What you are offering is Bircher's testimony up to page 1057?

Mr. Strong: Inclusive.

The Court: That begins on page 1042 to 1057?

Mr. Strong: Yes.

The Court: And on page 1061?

Mr. Strong: Page 1061, lines 10 to 12—10 to 12, inclusive.

In addition to that, beginning on page 985, all of Mr. Malin's testimony which was admitted is being

offered as against the defendant Himmelfarb at this time.

The Court: All of Malin's?

Mr. Strong: Yes. Some of these documents were admitted as against the defendant Ormont. That is, one of these two sets, Exhibits 50 and 51; your Honor admitted the ones which Mr. [1139] Ormont signed, against Mr. Himmelfarb, and the one Mr. Himmelfarb signed against Mr. Ormont. In connection with this testimony I now offer the document signed by Mr. Ormont against the defendant Himmelfarb, and the one signed by the defendant Himmelfarb against Mr. Ormont.

Mr. Malin's testimony goes on to the next volume. That testimony is being offered as I indicated to your Honor.

The Court: Taking Malin's testimony first——

Mr. Strong: That begins on page 985. I might say just a word in explanation. Mr. Malin's testimony relates primarily to the fiscal year return, which is Government's Exhibit No. 6, and the work he did in connection with it, which is Government's Exhibits 50 and 51. [1140]

The Court: Well, it seems to me that the question of the admissibility of the testimony of Mr. Phoebus and the testimony of Mr. Bircher against the defendant Himmelfarb must turn on the proposition as to whether or not the presence of Malin, the accountant, the agent of the attorney for Himmelfarb and Ormont, at those conversations would modify the hearsay rule as to Himmelfarb, because Himmelfarb was not present at the conversation

with Phoebus which you have offered nor the testimony of Mr. Bircher, to which I sustained an objection so far as Himmelfarb was concerned.

What have you to say about that, Mr. Katz? In other words, Malin's testimony is now in the record as against Ormont completely and as against the defendant Himmelfarb in so far as the exhibits are concerned. I excluded as to Himmelfarb his conversations with Phoebus and Bircher. If he was the agent of Himmelfarb, doesn't that break down the hearsay rule and make it admissible against the principle, to wit, Himmelfarb?

Mr. Katz: If the Court please, it is my thought that it does not, for this reason: In the first place, the agent that your Honor refers to was the agent of an attorney who was the attorney then for two defendants. Now in the absence of any other evidence—and let's assume now that the presence of an agent would affect the hearsay rule—in the absence of any other evidence the situation is [1141] and must be accepted as one where the agent for the attorney, who was the attorney for two defendants, or if the attorney himself had been there, was there on behalf of one of the defendants with respect to whose matters inquiry was being made.

The Court: No, he wasn't. His testimony was that he was retained by the attorney Mirman to do work in connection with Himmelfarb and Ormont.

Mr. Katz: Right.

The Court: And that he met Himmelfarb and Ormont at the attorney's house and that subse-

quently he had this meeting with Phoebus at which Ormont made some statements to Phoebus.

Mr. Katz: Yes, your Honor.

The point I make to your Honor is this, that as counsel representing two defendants who have questions respecting their separate incomes involved, that an appointment by me with respect to and on behalf of one of them, that I am not then, and particularly an agent who I might send together with one such defendant as to an inquiry being made or a conference being held with him, does not necessarily make me for the purpose of that hearing, nor am I there for the purpose of that hearing, nor would my agent be there for the purpose of that hearing in connection with another defendant whom I may represent. And consequently in the absence, I say, of any showing here that the agent was one who went there for the purpose of representing Himmelfarb—— [1142]

The Court: He was there for the purpose of representing both of them. I think that is the record.

Mr. Katz: The record is [1143] that he was employed by the attorney to do work for both of them.

The Court: And he subsequently conferred with both of them, and subsequently conferred with the agents concerning both of them.

Mr. Katz: Let us assume—there is no evidence here, but let us assume he already called up the accountant and said Mr. Ormont has a conference or appointment scheduled with certain agents at a certain time. Will you go along with Mr. Ormont at that time? There was no conference; nothing, in so

far as the agent of the attorney is concerned, affecting the defendant Ormont.

That is one phase of it. There is another phase. That is the matter of the agent not being one who can abrogate the hearsay rule. The fact that he might have been at a conference, might have talked to someone, is not binding upon such person merely because he was there, and it is the rule in the Federal Court as well as in the State Court, that declarations of third parties concerning a criminal or unlawful act which forms no part of the *res gestae*, are not declarations of the co-partner relating to a conspiracy.

The Court: There is no conspiracy.

Mr. Katz: The declarations and confessions of each conspirator after the offense is completed are not admissible against the co-conspirator. This is a conversation, if the [1144] Court please, subsequent to the filing of the return, charged as against the defendant Himmelfarb, or as against the defendant Ormont, in which Himmelfarb is jointly charged. It is subsequent in point of time. Even if there were a conspiracy, the offense having been completed prior to the time of the conference, the declarations and admissions then would not be admissible under any theory. They would not be admissible, in my opinion, if the defendant Himmelfarb had been there and sat silently by.

The Court: Let me see. Was the witness Malin present on May 15? I am looking at page 902.

Mr. Strong: He does not come in until May 21.

The Court: Malin does not?

Mr. Strong: No; that was what he said.

The Court: He said he was present with Phoebus and Eustice at a conversation at the Acme Meat Company. Where is that referred to in the transcript? That is, Malin said he was present?

Mr. Strong: Page 1001.

The Court: Who is talking now?

Mr. Strong: Malin.

The Court: There is not any conversation introduced concerning that occasion. I don't find any testimony in the record here either by the witness Malin or the witness Phoebus or the witness Bircher, where the defendant Ormont was present [1145] and the defendant Himmelfarb was not, of a conversation by Ormont. In other words, there is testimony where Ormont, Phoebus, Bircher and Eustice and Slick were present at various conversations, but none where the defendant Himmelfarb was present, nor his agent Malin. Neither of them was present at the conversations covered by Mr. Phoebus' testimony, that you have referred to, and neither of them was present at the conversations which Mr. Bircher testified to, as you have indicated, on page 1061.

Mr. Strong: May I be heard further on that before you Honor rejects it? [1146]

The Court: Yes.

Mr. Strong: Mr. Ormont is the agent for the defendant Himmelfarb in those conversations. Mr. Ormont and Mr. Himmelfarb are engaged in the same transaction, which was testified to here by various witnesses. Mr. Ormont and Mr. Himmel-

farb have not only retained the same attorney and the same accountant to file the same returns, and not only have they both signed the same document which they prepared, which relates to the income of \$70,000, but they have both filed almost identical documents—and I think they are identical—letters and the attachments, which are Government's Exhibit 50-D and 51-C, which are the letters, one signed by Ormont and one signed by Himmelfarb, and your Honor will find that they are exactly the same. They are an explanation of the transactions and they are in further concealment of the money.

The affidavits, which are Government's Exhibits 50-C and 51-D, are also in further concealment of the funds——

Mr. Katz: He is now going outside the record again. There is no evidence against the defendant Himmelfarb as to any concealment.

The Court: Let him make his argument.

Mr. Katz: I am sorry.

Mr. Strong: Thank you.

Government's Exhibit 51-D and 50-C, which are affidavits, are also the same type of evidence which shows that the two [1147] defendants are engaged in the same transaction, precisely the same transaction.

The Court: Let me see that document by Phillip Himmelfarb.

(The document referred to was passed to the Court.)

The Court: No, I do not think that Ormont could be the defendant Himmelfarb's agent for the purpose of making these admissions. If this were a con-

spiracy charge the evidence might be admissible, but it is not.

Had the witness Malin been present or an agent of the defendant Himmelfarb whose authority extended to discussions—now Malin was authorized or retained for the purpose of aiding in connection with the Internal Revenue matters, their income tax matters—had the conversations occurred in the presence of that agent I think it would have been admissible. But the record does not show that they were, so the motion is denied.

Mr. Strong: May I say one thing more?

There is evidence to the effect that Mr. Ormont stated to the agents that he had discussed the entire matter of the 1944 return.

The Court: It is still hearsay.

Mr. Strong: And that Mr. Himmelfarb had authorized him to state that he would cooperate, and there were other statements which I don't remember. [1148]

The Court: I know that, but that is still hearsay as to Himmelfarb. The motion is denied.

Do you have any other witnesses?

Mr. Strong: The Government rests, with one exception, I think there may be some documents here.

The Court: There were these two bank statements. I think they are admissible as against Himmelfarb.

Mr. Katz: May I interpose my objection to indicate to the Court why I do not believe they are?

The Court: The bank records?

Mr. Katz: Yes.

The Court: Let me look at them and then I will understand what you are talking about.

(The documents referred to were passed to the Court.)

The Court: Tell me why they are not admissible.

Mr. Katz: They are not admissible for this reason, if the Court please, that with respect to one of the exhibits that your Honor has in his hand, I believe that that is a date subsequent to any time that is in issue in this case, and with respect to both of them other than the statement of the witness Pingree that those are the records of that account, there is no foundation laid. They haven't been connected up with anything any place. No one has testified with respect to those exhibits in any way, shape, form or manner.

The Court: The year 1944 is not in here. Did you have it? [1149]

Mr. Strong: That is part of the other exhibit that is already in evidence. Those, your Honor, were produced at the request of the defendants to complete the picture.

Mr. Katz: They were brought in so that the witness while here could examine them and have all of them before him, so that if they did become material they would be here. But there is no materiality shown.

The Court: At the time I declined to admit these I had in mind that they were before and after the year involved and were thus possibly not material. As far as the foundation is concerned, I think the

foundation has been established because the signature card was produced, signed by the defendant Himmelfarb, and his signature was identified, and it was testified that this was the account on that signature card.

As to whether or not these are material, I am inclined to think they are because from it the Government may argue, or the jury may draw the inference, that his account, having run in this bank at that certain sum during these periods and a subsequent period, is indicative of the commission of the acts charged.

The objection is overruled and 36-B and C are admitted as against the defendant Himmelfarb.

Mr. Robnett: Your Honor, I wonder if Mr. Strong is offering those as to the defendant Ormont? Those, as I understand [1151] it, are the defendant Himmelfarb's exhibits.

Mr. Strong: I assume that if I offer them as to the defendant Ormont the same reasons would prompt your Honor to deny them.

The Court: That is correct.

Mr. Robnett: There are some others that I believe you did offer as to Mr. Ormont, and I don't know whether the Court ruled on them or not.

Mr. Strong: It is these documents, your Honor.

The Court: 50 and 51?

Mr. Strong: Yes.

The Court: The ruling I made at the time of their admission will stand.

Mr. Robnett: As I recall, that was a separate ruling.

The Court: Yes. Ormont applies to Ormont and Himmelfarb applies to Himmelfarb only.

Mr. Strong: The Government rests.

The Court: The Government rests.

Mr. Katz: May I at this time also be heard again, Honor?

The Court: Yes.

Mr. Katz: If the Court please, this is now a motion and I do move this Court to acquit the defendants on Count 1 and Count 2 of the indictment, which are the only two counts in which an offense is attempted to have been alleged. [1151]

The Court: On Count 1, do not waste any time arguing it, I do not think that there has been any tie-in of the defendant Phillip Himmelfarb to the alleged offense of Sam Ormont. On Count 2, if you will confine your motion to that, I will hear from the District Attorney on Count 1. [1152]

Mr. Katz: If the Court please, with respect to Count 2, there is in evidence before this Court the personal income tax return for the calendar year 1944 for the defendant Phillip Himmelfarb, and the defendant's wife Ruth Himmelfarb. With respect to that exhibit, if the Court please, it has been presented in evidence. No testimony has been elicited of any kind or character from any person——

The Court: Yes, the signatures were identified.

Mr. Katz: I was going to say with respect to any question as to whether the income tax as therein reported was or was not correct. There is no evidence with respect to the matter shown in that report. There is no evidence before this Court——

The Court: Yes, there is.

Mr. Katz: We will go on to that. Now I think your Honor is going to refer to Exhibit 6.

The Court: That is right.

Mr. Katz: With respect to Exhibit 6, if the Court please, that was filed as a joint venture return, subsequent to March 15, 1945, the on or about date alleged in the indictment, and sometime about the 20th, I believe, of May, 1945—I am not trying to give the exact date.

The Court: 24th of May.

Mr. Katz: But about the 20th, which is subsequent in time to the return of the calendar year, with respect to this, [1153] and in my argument, if the Court please, I am having in mind, the evidence in the record against the defendant Phillip Himmelfarb; I am excluding from my mind, as I believe the Court has, or should, any evidence in the record as against the defendant Sam Ormont—with respect to that Exhibit 6 there is no testimony of any kind or character against the defendant Himmelfarb respecting what is shown thereon other than——

The Court: Yes, there is.

Mr. Katz: Other than his signature. That covers a period from May 1st, 1944 to April 30, 1945. Now, that covers a period part in 1944 and part in 1945.

There is no evidence against the defendant Himmelfarb as to whether any part of that income shown in Exhibit 6 was earned in 1944. It might have been; it might not have been, in so far as the evidence in this record against this defendant.

Unless it is shown that there was some income of

this defendant, in addition to what he reported in his calendar year return for 1944, and unless it is shown that that income was for the year 1944, and unless it is further shown that such income was reportable for the calendar year 1944, not for some other year, and unless it is shown there was an attempt to evade, or an evasion of such taxes as were earned in 1944, and reportable in that year, and unless it is shown that that was all wilful, I believe your Honor is going to have to agree [1154] that there has been no offense established, because what I have just named are the elements that go to make up the offense.

The Court: You must keep in mind, for the purpose of this motion, I am not sitting as a jury.

Mr. Katz: Your Honor is not sitting as a jury, except as a thirteenth juror.

The Court: No, nor as a thirteenth juror.

Mr. Katz: Your Honor has this obligation and this duty: First, your Honor must determine whether under the law, as a legal proposition, any offense has been stated. Secondly, your Honor must consider whether there is any evidence——

The Court: My function is to determine whether or not there is evidence in the record upon which reasonable men might differ.

Mr. Katz: That is all I am asking your Honor to do.

The Court: And as to whether or not the defendant Himmelfarb is guilty as charged in Count 2. My function is not to determine what the result of this evidence is. It isn't my judgment whether or

not reasonable men might differ; that somebody might conclude he is guilty.

Mr. Katz: I am going to use the language of this Court, and make the statement to your Honor that there is no evidence—there is not any evidence that any part of the income shown in the fiscal return was earned in the year 1944. I believe that is a true statement of fact. [1155]

The Court: Let me see Exhibit 6. No, I can't agree with you, Counsel. It says, United States Partnership Return of Income for Calendar Year 1944 or fiscal year beginning May 1st, 1944 and ending April 30, 1945. Miscellaneous Income.

Mr. Strong: May I show your Honor the original for more leisurely reading?

The Court: It will help. The print is fine enough on the original. No, I think the inference is fairly deducible from the face of the return that it was earned in 1944. In any event, from that coupled with the return filed by the two of them, I think that statement by Himmelfarb was admissible, which I have admitted, and the statement of Himmelfarb shows that the money was earned during that period.

Incidentally, on the matter of the fiscal year, which you will be getting to pretty quick, or somebody will, the regulation of the Treasury Department—I don't have the reference to it. I don't think the Government has yet submitted your instructions, have you?

Mr. Strong: No, not yet, your Honor. I wanted to see which way this trial went.

The Court: Do you have the regulation number, which permits only a fiscal year income to be filed by an agency which regularly keeps books of account?

Mr. Katz: There is no evidence here, that there were no books and records of account kept, your Honor. [1156]

The Court: What is the regulation number?

Mr. Strong: I don't know the number. It provides it shall be filed on the calendar year basis, unless the books are kept on a fiscal year basis.

The Court: There is evidence here that there was something kept. That is a question of fact for the jury to decide. [1157]

Mr. Katz: Even that isn't any evidence against the defendant Himmelfarb. Your Honor is now getting over into the defendant Ormont's statements.

The Court: His statement is he kept no books.

Mr. Katz: Your Honor is referring to—let me have Exhibit 50 again.

(The document referred to was passed to the Court.)

The Court: "During the period commencing May 1, 1944 and ending April 30 I received from the joint venture which I have engaged in with Samuel Ormont the sum of—" that isn't it. It must be the letter.

The Clerk: You have all the exhibits there, your Honor.

Mr. Strong: It says in it——

The Court: "The record is accurate. No other records are kept. All the moneys received are represented by the total reported. We kept a cumulative record."

Mr. Strong: Section 41 of the Internal Revenue Code—if your Honor wishes to see it I can pass it over.

(The volume referred to was passed to the Court.)

The Court: Section 41 of the Regulations 111.

Mr. Strong: The Internal Revenue Code is in small print, I understand.

The Court: I think the defendants would be entitled to have submitted to the jury as a question of fact whether or not those books were, or whether that little piece of paper was [1158] in compliance with this requirement so that they could file on a fiscal year basis.

Mr. Katz: With respect to the matter, if the Court please, of a cumulative record and that no other records were kept, if that can be said and deemed to be a statement or evidence that no books and records were kept, the fact is that what books or records are necessary are dependent upon the particular business or transactions, and where the fiscal return here indicates a return of a given sum without deductions for expenses of any kind or character, the cumulative record would constitute books and records.

Mr. Strong: I disagree, your Honor.

The Court: That is a question for the jury to

decide, whether or not if the taxpayer has no annual accounting period or does not keep books. Now it is a question for the jury to decide whether or not that little business is keeping books.

Mr. Strong: There is another regulation which I will submit to your Honor in the form of an instruction, which says they must be records which can be verified.

Mr. Katz: The point that I make, if the Court please, is that there is no evidence affirmatively that no books and records were kept, and consequently with just Exhibit 3, I believe it is, the defendant Himmerfarb's return, and Exhibit 6, there is nothing here before the Court in the way of any [1159] evidence that the defendant Himmelfarb received any income which was reportable over and above what he reported, which was reportable in any other manner than was reportable by him, or that there were any taxes due or owing by him to the Government.

The Court: No, I cannot agree with you. It is a question of fact for the jury to decide, and certainly upon which reasonable men might reach the conclusion that the defendants, as to their joint venture, kept no books and records. If that is the case, they were under an obligation to report and pay on an annual basis. If that is the case, Exhibit 6 shows that he received during the year 1944 a sum of money somewhere less than \$35,000 and more than he reported. Then the other exhibits, his return and his wife's return, shows that he did not report it. Therefore there is sufficient evidence in the record

upon which reasonable people might reach the conclusion that this defendant would be guilty as charged in Count 2.

Now as to Count 1, do you want to be heard?

Mr. Strong: No, I am satisfied with Count 2.

The Court: The motion for judgment of acquittal as to the defendant Himmelfarb is granted as to Count 1, and denied as to Count 2.

Mr. Katz: With respect to the matter of willfulness, isn't that a matter which the Court can consider that in the [1160] absence of any evidence showing willfulness that on that ground alone the Court has the power to grant an acquittal. I am assuming all that the Court said to be true.

The Court: Reasonable men can differ as to that. Reasonable men could reach the conclusion that what he did was willful.

Mr. Robnett: Yes, your Honor. I have some motions that I want to make to strike as well.

The Court: How long are you going to take?

Mr. Robnett: I think it will take me some little time. If it would be easier to take the recess before I started, that is all right with me.

The Court: We have to finish this trial this week if we have to work nights.

Mr. Robnett: I know, your Honor, but I want to protect my client's rights the best I know how, and it will take me some little time to make the motions. However, I am glad to proceed.

The Court: Suppose you proceed and outline your grounds to me without arguing them and then I can see what would be a justifiable time.

Mr. Robnett: Thank you, your Honor.

In the first instance, I wish to move to strike the conversation testified to by Mr. Phoebus, the witness Phoebus, as transpiring on the 18th day of May, 1945—if I can find [1161] the place.

The Court: Just state it and if you will give me the book and page, I have in mind the conversation.

Mr. Robnett: I believe it is on page 905 of the record.

I want to strike that entire conversation on the ground that no proper foundation was laid for the admission of it, and on the ground that the defendant Ormont was not prior thereto advised by the witness or anyone else representing the Government of his, Ormont's constitutional rights so that anything he said in that conversation could be used against him, or that he had a right to refuse to answer or that he had a right to counsel.

I base that now, your Honor—that is a renewal; I objected at the time, if you will recall and you overruled the objection.

The Court: You did not object to the testimony of the witness Eustice. You did object to the testimony of the witness Phoebus.

Mr. Robnett: I objected to the testimony of the witness Phoebus as to that conversation. I don't think the witness Eustice was there. I don't remember his testifying as to it.

At that time I objected on these same grounds. The Court I believe in its ruling had in mind that he was a deputy collector and therefore held that it wasn't probably necessary for him to do so because

he could not investigate violation of [1162] alleged fraud against the Government.

Since then I want to call the Court's attention to page 947 of the transcript wherein your Honor read Section 3654 of Title 26, the first paragraph of which applied to Internal Revenue agents, "shall see that all laws and regulations relating to the collection of Internal Revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in violation thereto."

Then you say, "Incidentally, there is a similar power given to the collector by Section 3654, and like authority to deputy collectors."

It was shown that Mr. Phoebus at that particular time, at the time of that conversation, was a deputy collector. That is in the record, your Honor, and therefore he would have had such authority to investigate frauds and there was no warning or any advice given Mr. Ormont whatsoever at that time. At that time, as you recall, the evidence showed there wasn't any until the 24th.

The Court: That is in the office upstairs; that is correct.

Mr. Robnett: And therefore I move to strike all of the testimony of Mr. Phoebus as to that conversation on the 18th day of May, 1945.

The Court: All right. Your next motion? [1163]

Mr. Robnett: My next motion, I move to strike at this time all evidence of Mr. Eustice, all evidence against this defendant, on the ground that it was admitted over objections and it was incompetent,

irrelevant and immaterial, based largely upon hearsay testimony, and hearsay testimony was admitted by virtue thereof, of the admission of his testimony, into the record after repeated objections to any such testimony. And also after a motion to strike portions of it and the running objection, as I understand, to that testimony on the grounds that I have stated, that it was incompetent, irrelevant and immaterial, and hearsay testimony, a great deal of it, based upon a number of things that were outside of the hearing of the defendant, conversations that he had with other persons, records that he had obtained from somewhere else or information he had gotten from some other agent or someone else, that he did not vouch for and would not, and that it would be hearsay as to Mr. Ormont.

The Court: On that motion I am satisfied that my rulings at the time were correct and the motion to strike the testimony of the witness Eustice is denied.

Mr. Robnett: Very well.

Now, your Honor, I believe that you denied a motion to strike part of his testimony and you based it upon the fact that there had been cross examination and that I had cross examined the witness.

The Court: That was on redirect examination.

Mr. Robnett: I beg your pardon?

The Court: That was on redirect examination; a portion of his testimony.

Mr. Robnett: That testimony, without taking your Honor's time to refer to the record—do you know what I am referring to; that I did make a

motion at the time to strike considerable of his testimony?

The Court: Yes.

Mr. Robnett: I wish to renew that motion at this time, on the ground stated therein, particularly on the ground that it is incompetent, irrelevant and immaterial, and based upon hearsay, no proper foundation having been laid for its introduction.

I wish to call your Honor's attention to the fact that we have in this action, as you recall, an understanding or stipulation that unless the counsel for the other defendant announced that he was not joining in any objection or motion or ruling that any and all objections, and any and all motions, made by any counsel would be deemed to have been made by the other counsel. We have had that throughout the trial.

The Court: Yes.

Mr. Robnett: Therefore, every objection that was made by Mr. Katz applies likewise to me, as though I had made the objections as to all of this evidence of Mr. Eustice, before it was introduced.

Mr. Strong: Absolutely. [1165] That applies also to objections made by Mr. Katz to questions asked by Mr. Robnett.

The Court: I don't see how that can be. I think it applied only, of course, to questions asked by Government counsel. In any event, giving consideration to it with reference to your client, the defendant Sam Ormont, I think my ruling was correct as to all.

Mr. Robnett: Your Honor, if you have in mind

that the cross-examination waived it, I would like to cite your Honor some authorities on that proposition.

The Court: Another conversation was not introduced on redirect. It was other things in the same conversation, that the witness had testified to on direct, and it was a limited amount of testimony, which I deemed that you had covered in your cross-examination.

Mr. Robnett: Perhaps I have to refer now to the volume. I think it is page 299, the one I am talking about, and that was during cross-examination, I think.

The Court: Before we go into discussion of this, will you state the rest of your motion, because if we are going to be all afternoon, I don't want to leave the jurors upstairs.

Mr. Robnett: I don't know how much more your Honor wants to listen to. I will have motions to follow; motions to strike.

The Court: You have some more motions to strike? [1166]

Mr. Robnett: Yes.

The Court: Then you will have a motion for judgment of acquittal?

Mr. Robnett: Yes. I will have separate motions to separate counts. I would like to be heard on them, not to a great extent. It will take me a little time, if your Honor please. I don't think it will be imposing too much, however.

The Court: It is not any imposition. What I am trying to do is to find out how long you are going to

be. In other words, I don't want to have the jury inconvenienced, and about fifteen minutes after four call them down, and tell them to go home.

Mr. Robnett: I suppose if your Honor will take a recess this afternoon, it will be about an hour, including the recess.

The Court: All right, call the jury down. The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: Yes.

Mr. Katz: So stipulated.

The Court: Ladies and gentlemen of the jury, I am sorry to have had to keep you here this far, this afternoon, but it appears at the present rate we are proceeding that if we conclude with the various arguments and motions which must be made out of the presence of the jury, it will be [1167] quite late. Rather than keep you here until 4:15, and taking only 15 minutes of your time, I believe it will be better if you are excused until tomorrow morning at 9:30 o'clock. You are therefore excused until that time. Remember the admonition.

(Short recess.) [1168]

The Court: All right, Mr. Robnett.

Mr. Robnett: I want to call your Honor's attention particularly to the fact that at the very outset of the case I moved this Court that no evidence whatsoever be admitted on the ground that the indictment didn't state a cause of action, and further that the defendants have been placed once in jeop-

ardly, and that that objection should go to the evidence thereafter to be admitted or offered.

Then on the afternoon of May 27, 1947 this occurred—it is on page 287 of the transcript—the witness Eustice was on the stand under direct examination and I made this motion:

“If the Court please, I move to strike out all the testimony the witness has given in this connection on the ground that it is partially based upon hearsay, but most of it is a mere assumption and conclusion of the witness. He has used, for instance, the item he testified to which showed that that there was a \$10,000 repayment loan he previously made. That is not income. Your Honor of course knows many of the items he has testified to here he said they were unexplained so far as he was concerned and it is purely a conclusion of the witness, it is not the kind of evidence to introduce before the jury to try to convict a man for evading income tax.” [1169]

Then there is some other discussion by Mr. Strong and then I, on the next page, 288, stated: “Other than that, there is no foundation.” That is on line 8.

Then on line 19, “No proper foundation has been laid for any of it by this witness. Further than that, there is no showing as to all of these things where he was getting his information from, and he is testifying here today concerning opinions. They may have been opinions, as he admitted as to the bonds obtained from someone else. It is hearsay. There is

not anything authentic about it. I never heard him testify he made all of that report.”

Further on page 289 again, “I don’t believe they have laid any foundation that this report he has before him was made by him from things he did examine.”

Then on page 290 you stated, your Honor: “I think it goes to the weight of the testimony of the witness.”

The Court: Yes, and I also stated there on page 288:

“I think all of that rather goes to the weight of the testimony of this witness. Whenever this witness has used the word ‘I find that his income was such-and-such’ and ‘his adjusted income should have been so much,’ it must be accepted only as the opinion and conclusion of the witness because, after all, income tax agents, so far as that phase of his [1170] testimony is concerned, is nothing more than an expert witness and the jury may regard his testimony if they desire in that respect. It goes to the weight and not to the admissibility.”

Mr. Robnett: Yes, your Honor. But his whole testimony of necessity was based upon things he did not know of his own knowledge and things that there was no proper foundation for him to consider.

The Court: In his opinion.

Mr. Robnett: In his opinion. They were not even properly matters for him to take into consideration because the prosecution had not laid any proper

foundation for them to be before him. I think it was much more than a question of the weight of the testimony, it went to the very heart of his testimony, whether he could even testify at all or not. If he couldn't, anyone could come in here and say, I have gotten information hither and yon and it is my opinion so-and-so. That is the effect of it. So I really am serious in saying to your Honor that I don't believe that that evidence is proper at all, any of his testimony. It is based upon matters dehors the record and that that witness, of necessity, had to take from someone else or from somebody else that was not before the Court nor the jury and couldn't be verified in any way. Much of it was hearsay testimony. He said he talked to people and that Mr. Phoebus had done this, or Mr. Someone else [1171] had done something. So that, as I say there, had been the prior objection made at the very outset. Then there were objections as we went along and before he had finished and gotten into it and really given the detrimental testimony that he has given, if his opinion is worth anything, I had this motion in the form of a motion and objection that no evidence be considered of his. I think that it was more than going to the mere weight of the testimony. [1172]

Mr. Robnett: Now, my motion is further upon this ground, that anything Mr. Eustice did, or anything anyone else did, was after Mr. Ormont was under a threat. That was suggested this morning, and I want to incorporate that, without repeating

it. I call your attention to the record. You know what I am referring to, I believe.

The Court: Yes.

Mr. Robnett: After the 18th day of May, 1945. Consequently, I wish to incorporate that as a further ground of my motion, and I want to make a motion further, as will be found on page 309 of the transcript, I believe; that is as to the bond, line 12. By the way, the witness has been talking about the bonds, and I move to strike all the evidence as to bonds, upon the ground that it was hearsay from the witness.

The Court: The ruling to it will be reserved.

Mr. Robnett: That is right, your Honor. It was reserved, and I urged it at that time on the very grounds I have been stating.

The Court: I will deny that. And on the reservation of my ruling I will overrule your objection to the motion to strike the testimony of the witness Eustice.

Mr. Robnett: My grounds of motion has not been completed, your Honor.

The Court: I am sorry. I thought you had completed them.

Mr. Robnett: As grounds for the motion I also wish to [1173] incorporate, without taking time to read it, each and every ground I urged in my motion to dismiss the indictment, the original, on the ground that it did not state an offense; and in my motion for a bill of particulars in this case, which, as I say, was denied in chief, most of it was denied,

if it may be considered they are offered in the record here, without restating each and every of those——

The Court: Yes.

Mr. Robnett: Thank you. Then I wish to add to my motion, on this motion to strike, the further ground that the indictment, particularly Count 1 of the indictment, and therefore the motion, as to this would be as to any evidence pertaining to the year 1944 by this witness, be stricken on the ground that in Count 1 of the indictment there is a variance in the proof and the charge in the indictment. The variance I raised once before, and in particular it is based upon Exhibit 3, I will make that certain. Yes, your Honor, in Exhibit 3, which is Sam Ormont's income tax return for the year 1944. That is what the indictment charges, and it says that he filed a false and fraudulent income and Victory tax return. That is the matter which they charge he committed the crime, about filing a false and fraudulent income tax and Victory tax return. And that this Exhibit 3 is a variance in the indictment. It should never have been admitted.

I now again move to strike it on the ground that it is [1174] not an income or Victory tax return, and there is no proof in this case that any such was ever filed by the defendant.

I believe that, your Honor, constitutes about all the ground for the motion to strike Mr. Eustice's testimony; and without having to go over all of the grounds again, it may be considered that I am making a separate motion on these same grounds, however, to strike all of Mr. Phoebus' testimony with

regard to the bonds and the list of bonds, and all his oral testimony concerning them, and concerning the funds with which they were bought, according to his opinion.

The Court: Mr. Phoebus?

Mr. Robnett: I mean Mr. Eustice's testimony; upon the same ground I move you to strike all of his testimony, and if I may, without waiting for a ruling, I would like to make a similar motion to strike the list of bonds that is in evidence here, Exhibit 42, on all those same grounds that I have stated, and likewise strike all testimony of Mr. Malin respecting them and that list; all testimony of Mr. Phoebus respecting that list of bonds; all testimony of Mr. Bircher respecting these bonds, considering that as a separate motion as to each one, rather than just one.

I want to move to strike all testimony of Mr. Phoebus as to any conversations respecting the year 1942; and a similar motion as to 1943 and a similar motion as to 1944.

The Court: Did Phoebus testify about 1942 and 1943? [1175]

Mr. Robnett: I don't know, without analyzing it, as to whether any of his testimony would be applicable to those first two years, excepting he did testify about conversations. That's what I have in mind, insofar as they might have any bearing on this case. He testified he was investigating all of the taxes at times. He did not go into any detail as to those years, I don't think. The ground of that motion being in addition to other grounds I have stated, as

the record shows, Mr. Ormont starting with the 18th of May, 1945 and through the 24th. [1176]

The Court: That is the 15th, isn't it; Isn't it May 15th?

Mr. Strong: That was corrected later to the 18th.

The Court: It is May 18th, is that right?

Mr. Strong: Yes.

Mr. Robnett: Going through May 24, 1945. And thereafter also the defendant cooperated in every way with the Department of the Internal Revenue, the Treasury Department of the United States; that he gave them any information and books and records that he had, gave them access to his bonds and his bank accounts and everything in that particular; told them that if he owed them any tax he was ready and willing to pay it.

The Court: This was on May 24th?

Mr. Robnett: This was on May 24th?

The Court: Are you moving to strike that testimony of May 24th?

Mr. Robnett: I am moving to strike all of his testimony, your Honor, on all dates, for this reason, that the Treasury Department of the United States has a policy that where a taxpayer does fully cooperate with them before investigation begins that there will be no criminal prosecution, and that was publicized all over the country, has been for years and is generally known—and your Honor I think can take judicial notice of it—and that thereafter at the time at least as to [1177] '42 and '43, that Mr. Ormont on May 24th gave them access to his books and records, told them what he knew and

all the things that your Honor knows in the record, that at that time not one of the Government agents had been assigned to or had begun any investigation of Mr. Ormont's income or income tax reports for the years 1942 or 1943.

There is in the record some evidence that they had recently been assigned to investigate his returns for 1944 only. You will recall Mr. Phoebus' testimony that that was their first assignment.

The Court: 1944?

Mr. Robnett: Was for 1944; yes, sir. And that it was later in the summer or during the other parts of the year than May 24th, later than that, when a different assignment was given them as to 1942 and 1943.

Therefore at that particular time on the 24th no investigation had been started, and there has been a ruling by the attorney for the Treasury Department, at least whatever authority it is, that the investigation under their policy does not begin until a man is specifically assigned to make that specific investigation which, as I say the record shows conclusively, none had been assigned for 1942 and 1943 prior to the conversations and the handing over of the books and the doing of all these other things.

I believe that covers the grounds of my motions to strike. [1178]

The Court: All the motions to strike are denied except your first motion to strike the testimony of the witness Phoebus of the conversation on May 18th, which is granted.

Mr. Robnett: Thank you, your Honor.

Mr. Strong: Can I be heard as to that?

The Court: May 18th and May 23rd, I think.

The warning was given on May 24th.

Mr. Robnett: All right.

The Court: Do you have anything new to add to what you have already said?

Mr. Strong: Yes. He was a deputy collector. There was no investigation.

The Court: Yes, but on having recourse to the statute, as I indicated in the transcript at the time I was reading it, that section authorized the Deputy Collector to conduct investigations of fraud on revenue matters.

Mr. Strong: But the evidence here is that he was going down to get the unpaid tax. There is no evidence that he was investigating fraud, if I understand your Honor correctly.

The Court: I understood his testimony was—I was just reading it again—"I had an assignment at that time to make an investigation of the income tax returns of Mr. Ormont and Mr. Himmelfarb for the year 1944."

Now I stated that I would take judicial notice of the fact that a deputy collector was not authorized to conduct a [1179] criminal investigation. After stating that I read the statute again and noticed that he is authorized by law to do that, or such duties I think as the collector assigns him to.

What did I say those sections were?

Mr. Robnett: I think I have them right here, your Honor.

The Court: "Every collector within his collection district shall see that all laws and regulations relating to the collection of Internal Revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in relation thereto. For such purposes he shall have the power to examine all persons, books, papers, accounts and premises, to administer oaths, to summon any person to produce books or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as is provided in 3615.

"(b) Every deputy collector shall have like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself. But each collector shall in every respect be responsible both to the United States and to individuals as the case may be for all money collected and for all acts done or neglected to be done by any of his deputies while acting as such. Every Internal Revenue agent shall see that all laws and regulations [1180] relating to the collection are faithfully executed and complied with and shall aid in the prevention, detection and punishment of any frauds."

Mr. Strong: May I read this part of the transcript to your Honor? This is cross-examination, and he was asked there:

"Q. Mr. Phoebus, as I understand from your testimony, you are employed by the United

States Government in the Internal Revenue Department thereof up to July 1, 1944 as what is known as a deputy collector.

“The Court: 1945, was it not?

“The Witness: 1945.

“Mr. Robnett: Pardon me. 1945.

“The Witness: That is correct; yes, sir.

“Q. How long have you been such deputy collector?

“A. Since August 27, 1942.

“Q. I don't know anything about the duties of the different departments and maybe some of the jurors don't. Will you tell me what your duties were as deputy collector?

“A. We call on taxpayers for delinquent taxes by means of information which is obtained from the files of the collector's office and to determine whether or not there were any delinquent taxes. I [1181] believe that fairly sums it up. There are other duties of the collector's office which I was never assigned to with respect to collecting taxes which have been assessed, that is, which have been recorded on the records as being due but not having been paid. I was never assigned to that part of the collector's duty but that was part of the function of the field division, the entire office.”

Then he goes one down here further to page 945:

“Q. And that was as you testified yesterday, that assignment was to investigate Mr. Ormont's returns for the calendar year 1944?

“A. I am not sure but I believe in my testimony yesterday I used the phrase ‘to determine the correct income tax liability’.”

May I submit to your Honor that that is what they were doing there, to determine the correct income tax liability.

The Court: I think that the witness’ testimony in respect to that is not the best evidence as to what his duties are.

Mr. Strong: On a particular occasion, your Honor?

The Court: The law also authorizes the Commissioner of Internal Revenue to issue rules and regulations. Now if he has issued a rule or regulation—I am not familiar with it—for the internal management of his department which limits [1182] the powers of deputy collectors, and my recollection is and has been that a deputy collector has no authority to investigate criminality, neither has an agent, only a special agent. In other words, if there is any criminality suspected in a case it is assigned to a special agent.

Mr. Strong: That is my understanding.

The Court: And until a special agent is assigned to it. But I do not know of any rule or regulation of the Internal Revenue Department that exists in relation to that. I suppose that if there is I can take judicial notice of it. But all I can take judicial notice of now is the power of a deputy collector as the statute provides, and in view of that power at that time I think that the ruling I made just now striking the testimony of Mr. Phoebus as to any

statements made on May 23rd and prior to that conversation in the office of Mr. Bircher—— [1183]

Mr. Strong: Would your Honor reserve ruling on that? I think there may be some regulation to assist your Honor in determining to the contrary. I will bring it in in the morning.

The Court: I will rule on it now. Counsel will want to know for his motion. I will grant the motion to strike it now. I must rule on it, because he is entitled to make another motion, and to know what evidence is in the record. Does that dispose of all motions to strike?

Mr. Robnett: It does not. I want to move to strike the testimony of Mr. Eustice on pages 843, 844 and 845, with regard to certain bonds therein. I won't stop to take time to read them. He was testifying about bonds. He was asked: In your examination from the records of the Acme Meat Company—bonds and checks—were those checks used to pay for bonds? I objected upon the ground that the books would be the best evidence, and it was asking for an opinion of the witness, and I called your attention several times to the fact that it was incompetent, irrelevant and immaterial. And your Honor, on page 845, in ruling said: The objection is not timely. Counsel cross-examined the witness at length upon the books and records and data of the Acme Meat Company, and now, upon that examination, I think you have waived any right to object which you may have. The objection is overruled.—That, of course, was the objection your Honor had in mind. It was after cross-examination. [1184]

The Court: Now, with relation to this, I think that you waived the right by not raising it at the time the witness testified concerning his examination of the Acme Meat Company's books.

Mr. Robnett: That is the point I have been trying to urge; that we had objected earlier.

The Court: That is right.

Mr. Robnett: And that Mr. Katz made objections to this before he was allowed to even use his exhibits, and went into voir dire examination, if you recall.

The Court: I think Mr. Eustice's testimony is all admissible. The motion will be denied.

Mr. Robnett: Very well. Then at this time, if the Court please, I now move for an order of this Honorable Court to acquit the defendant Sam Ormont.

First, I will take it in a little different order. On Count 2 of the indictment, which is the count as to Mr. Himmelfarb's taxes, and on the grounds stated by Mr. Katz in his motion to dismiss as to Mr. Himmelfarb on Count 1.

The Court: Without indicating this as a formal ruling at all, but in order to guide both counsel in connection with their preparation, and your views on the matter, it would seem to me that such motion should be denied as to Count 1, and granted as to Count 2. And I am doubtful if there is enough evidence in the record to let it go to the jury as to [1185] the years 1942 and 1943. About the only testimony in the record of 1942 and 1943 is the testimony of the witness Eustice, which was opinion

evidence. Perhaps Mr. Strong can point out to me some other evidence, but I don't believe there is any.

Mr. Robnett: I was going to make a separate motion for each of those counts.

The Court: State your motions formally for your record.

Mr. Robnett: Taking Count 2 first, because of the ruling your Honor had made as to Count 1, that is the count of Mr. Himmelfarb's income, or alleged income, I thought from your Honor's ruling awhile ago, in favor of Mr. Himmelfarb, if I understood it correctly, on Count 1, which is Mr. Ormont's income, perhaps I would not need to argue on those grounds.

I move to dismiss that, there being no evidence whatsoever to connect Mr. Ormont with Count 2; and all the evidence would be hearsay and incompetent. It hasn't even been admitted as to Count 1, and there is insufficient evidence to warrant it going to the jury, and the defendant should be acquitted on Count 2 by your Honor.

The Court: State your other counts. Just state your motion, and then I will indicate my preliminary observation, and will want to hear from the Government.

Mr. Robnett: As to Counts 3 and 4, may it be considered I am making separate motions as to those?

The Court: Yes. [1186]

Mr. Robnett: That there has been no proof or any evidence by this defendant; no sufficient proof to warrant it going to the jury. The corpus delicti

has not been established, nor has any wilfulness or intent of any kind been established, and it has not been established that the defendant Ormont did, in any one of those years, evade, or attempt to evade, any of his income, or reporting any of his income. And the evidence on that is wholly insufficient, and is hearsay, and is based upon hearsay testimony, and is incompetent evidence.

Without going into other details on it, I think that will be sufficient ground as to each of those two counts.

And I want to make a separate motion also for acquittal on Count 1, on the same grounds that were stated, I believe, by Mr. Katz, in his motion as to Count 2. That is the one that would apply to him, and I don't know that it is necessary to add any additional grounds.

In any event, there has been no wilfulness shown as to Mr. Ormont. As the record stands, all taxes have been paid, or nearly so, and your Honor will recall that the calculation showed that we had paid as much tax as the Government would have been entitled to, even if we accounted wrong.

There is no evidence shown of any criminal intent, or any attempt to evade; especially as to Mr. Ormont the evidence is all the other way. It shows he was always ready and willing to pay as he thought he should pay, and accounted as he [1187] thought he should, according to the testimony of the Government witnesses, and he never told them at any time anything that would indicate he had tried to evade the truth; that the only thing he was inter-

ested in was that the other department should not hear where the income came from.

I think that's sufficient.

The Court: In order that you may properly direct your argument, the way I view it, the motion should be denied as to Count 1, and granted as to Counts 2, 3 and 4, as to the defendant Ormont. That is not a final ruling, so the burden is upon you to show me wherein the testimony is deficient, if it is, on Count 1.

It looks to me like it is pretty clear, though, for the purposes of this motion, as to Count 1, that is, the 1944 income tax, without repeating the things I indicated to Mr. Katz when he was arguing, there was the return, there was the subsequent return, there were statements which are admissible statements, all of those showing the amount of money. In addition to that there is the date of the purchase of the bonds in the year 1944.

Mr. Robnett: There was only \$5,000, your Honor. You will remember the bonds were purchased in 1943.

The Court: Whatever bonds there were were purchased in 1944. So there is sufficient in the record so I cannot say that reasonable men could not reach the conclusion that the [1188] defendant would be guilty beyond a reasonable doubt as to Count 1.

As to Count 2, I don't think there is any evidence in the record which would connect him with the income tax return of the defendant Phillip Himmel-farb, only by the very widest possible stretch of an

inference, which I don't think I would be justified in indulging.

As to Counts 3 and 4, I would like to hear from the Government, because watching the testimony come in, the only testimony that I recall which related to the defendant Ormont, for the years 1942 and 1943, was testimony of the witness Eustice which, as I have indicated, is opinion testimony.

Mr. Robnett: You will recall that the Government witness also said those years were properly accounted for, and he did the accounting, and Mr. Ormont did not know anything about it. He only signed it, and sent them in. You will remember that Mr. Link made those reports. He said they were correct for those years.

The Court: Yes.

Mr. Robnett: May it be understood as to Count 1——

The Court: There was some testimony, outside of Eustice's testimony, by Mr. Link, that he found this batch in 1945.

Mr. Robnett: Yes, he found that in 1945.

The Court: But there were in 1942——

Mr. Strong: And 1946. [1189]

The Court: 1942 and 1943?

Mr. Strong: I think so; invoices for 1943.

Mr. Robnett: There have been no calculations on that. It was his duty to enter them; not Mr. Ormont's. So far as I can see, glancing through them, every one of them is in 1942.

May it be considered that all of my grounds, which I stated on my motion to strike, all of my

grounds stated in my motion to dismiss the indictment, and motions I have made here today, motion for a Bill of Particulars, and the grounds stated there, may be considered as part of my motion on Count 1?

The Court: For a judgment of acquittal?

Mr. Robnett: Yes, your Honor.

The Court: They may be so considered.

Mr. Strong: There is no point in my repeating what I said in connection with Count 2, since I have already said it. May it be considered as though I have restated it now?

The Court: Yes. The motion for a judgment of acquittal as to Sam Ormont, as to Count 2, is granted.

Mr. Strong: As to Counts 3 and 4, your Honor expressed the opinion that the only testimony was that of Mr. Eustice. I submit to your Honor there is in evidence the bank record, and every one of the other records, which on their face show the deposit of money in excess of the amount reported.

In addition to that, in the case of the testimony of Mr. [1190] Eustice, analyzing those records which are all in evidence as physical evidence before the Court, besides that there were bonds bought in 1943. I think some were bought in 1942, if I am not mistaken, in Government's Exhibit 42. Bonds bought in 1943 and bonds bought in 1942, as shown by Government's Exhibit 42.

In addition to that I call your Honor's attention to the testimony of Mr. Link. Mr. Link testified that these are the slips which were never presented

to him apparently for entry into the books, and each and every one of those invoices have the word "Paid" or the initials "Pd." with the date, showing some date in 1942, signed by Ormont, which, on the face of the documents, shows he received money not reported on his books, and is not part of his return for that year. [1191]

Besides that, Mr. Link testified of course that Mr. Ormont asked him to falsify the records for purposes of Mr. Link. I think that that is very important testimony. The falsification related to figures which Mr. Ormont wanted to have changed for his own purposes.

And those figures, incidentally, once they are changed are figures which tend to show that the costs for the goods which he purchased was beyond that which he actually paid, so there is a falsification right on the face of it, as to how much he expended, which is part of the money which he deducted from his gross income for that year.

So that we don't only have Mr. Eustice's testimony but we have Mr. Link's testimony as to falsification, as to the actual moneys received as shown by those invoices which, on their face, have Mr. Ormont's signature.

As to the moneys which he saw the defendant Ormont receiving and making entries on these sheets of paper which the witness testified to, in addition to these invoice moneys, the bonds themselves showing they were purchased during that year and the record showing deposits during that year, all present before the Court.

I submit to your Honor that on the basis of that evidence alone there is enough to permit the case to go to the jury on Counts 3 and 4.

But in addition, I submit to your Honor that the jury can [1192] take into account the entire practice followed by the defendant Ormont throughout 1942, '43 and '44 of receiving side money, of falsifying records, of concealing his assets. I think they can even consider that backwards in determining willfulness on his part. It is a connected series of same transactions all the way through. It isn't separate transactions.

In addition there of course is the conversations in which the defendant made various admissions as to how he bought the bonds and why he put them in his mother's name, and things of that kind.

The Court: Conversations about 1942?

Mr. Strong: All the bonds. He was talking about all the bonds as they were coming out of the box, as they were being recorded, and as to one of which he wanted to know whether as a matter of fact he could add his mother's name.

But even if we were to leave out the conversations with reference to how he was operating in 1944, Mr. Link's testimony, as I have indicated, the records themselves in evidence, which are better evidence of what was in those accounts than anything Mr. Eustice said about them, and all he was talking about were those records which were right here in court and which are in evidence and which can be examined by the jury and from which I can urge that, even if Mr. Eustice hadn't said anything about it.

Then there are the bonds themselves and various other indications which have been submitted, and I submit that there is enough to go to the jury on Counts 3 and 4 on that basis.

The Court: I think he is probably right, Mr. Robnett. I may be pardoned for saying this, but if I had to weigh Mr. Link's testimony I wouldn't give it much credence, but the jury might believe him.

Mr. Robnett: Well, your Honor, Mr. Link's testimony, as I understood it, was not that there was anything wrong, that he say anything done in '42 or '43, but Mr. Link testified——

The Court: He testified about these statements.

Mr. Robnett: Yes, but he testified about those, that the first time he saw them was in 1945. There is nothing here to show that they weren't accounted for in 1942.

The Court: He said that he didn't enter them on the books.

Mr. Robnett: He said he didn't enter them on the books but no witness testified for the Government that they weren't accounted for and the tax paid on them.

The Court: But he testified that he made the return out.

Mr. Robnett: Yes, he did.

The Court: From the books.

Mr. Robnett: That they were correct, that according to his knowledge they were absolutely correct, those returns.

Now you must remember he also testified that for

13 or 14 years he had been the sole bookkeeper except during a little [1194] absence now and then, and that he did all the bookkeeping.

The Court: I think you can argue that to the jury. I think that goes to whether or not his testimony is or is not to be believed.

Mr. Robnett: That only pertains to 1942, your Honor. In 1943 Mr. Link doesn't do anything. They can't sustain anything on 1943, even if your Honor considered that these could go in, these invoices.

The Court: What about the records of the bank, the bank deposits and purchase of bonds?

Mr. Robnett: There are records of the bank which show they are all accounted for even by their own accountant. He only says that he can't find where certain bonds were purchased, where he got the income for that, and he assumed that he had an outside income. He doesn't say that this shows up on the bank records that he got money there and didn't account for it, your Honor. He accounts for \$37,000, Mr. Eustice does, and every witness says this, that Mr. Ormont said all the time and over the years, and Mr. Bircher this morning said so, that over the years he, Mr. Ormont, had been saving money and had cash with which to purchase bonds and had purchased bonds and paid some of the money for bonds.

The Court: If I were sitting in the jury box on the years 1942 and 1943 I think that I would acquit the defendant, but sitting as a judge here and passing upon the question as [1195] to whether other

reasonable men might reach a different conclusion, I think as to both of those, from the evidence that is in the record here, that they could reach the conclusion that the defendant Ormont was guilty, and therefore I think I will have to deny your motions.

So on the motion for judgment of acquittal as to Sam Ormont, it is denied as to Counts 1, 3 and 4, and is granted as to Count 2.

Mr. Robnett: Very well, your Honor.

The Court: Let me see, we will be ready to resume at 9:30? How long do you think you will be, Mr. Robnett? Can you give me an estimate now?

Mr. Robnett: Yes, I can give you an estimate. I believe that I could put my evidence in in a day.

The Court: In a day?

Mr. Robnett: I believe I can. I won't promise, but I believe I can.

The Court: It depends then upon the extent of the cross-examination?

Mr. Robnett: Yes, that would depend upon that, of course.

The Court: And you, Mr. Katz?

Mr. Katz: If the Court please, I think I will have a better idea tomorrow morning as to how much time I will require. I hadn't anticipated that I would be here tomorrow [1196] morning but in view of the fact that I will now be back, your Honor, I will make the determination this evening.

The Court: Very well. If you can give me an estimate tomorrow I would appreciate it because I want to finish the case this week and I want to decide whether we are going to have to have longer

or shorter sessions. I don't want to press you, counsel. I don't want counsel on my account to forego anything at all which they think they should do on behalf of their clients.

Mr. Robnett: I will say this, I don't know what your rule is on it, or if you have any rule, that I feel having to cover three counts now with your Honor's ruling that it will require, as you may see our transcript is very large, a considerable time for my argument to the jury, if your Honor will be kind enough to let me do it, and I feel it is the only way I can present the evidence. There have been a great many exhibits which the jury haven't seen and I do think it will take considerable time for that. I will not delay, I will present my case with all dispatch.

The Court: It is not my disposition to deny counsel the right to present an argument to the jury. I haven't had any lawyers take advantage of me yet in that respect.

(Recess until 9:30.)

(Whereupon, at 4:20 o'clock p.m., a recess was taken until 9:30 o'clock a.m., Wednesday, June 11, 1947.) [1197]

Los Angeles, California, June 11, 1947

9:30 o'Clock A.M.

The Court: United States vs. Ormont and Himmelfarb.

Mr. Strong: Ready.

Mr. Katz: Ready.

Mr. Robnett: Ready.

The Court: Usual stipulation?

Mr. Strong: Yes, your Honor.

Mr. Katz: Usual stipulation.

Mr. Robnett: So stipulated.

The Court: Do you wish to make an opening statement, Mr. Robnett.

Mr. Robnett: Not at this time. Mr. Katz has his matter to present and then, if I may reserve until he is through.

The Court: Very well. Mr. Katz, do you wish to make an opening statement?

Mr. Katz: I have already made mine, your Honor.

The Court: Very well.

Mr. Robnett: After he presents his evidence is what I meant by reserving mine, your Honor.

The Court: Very well.

Mr. Katz: If the Court please, the defendant Himmelfarb offers in evidence income tax return for the calendar year 1945 for the defendant Phillip Himmelfarb, and the income tax return for the calendar year 1945 filed by Ruth Himmelfarb, both of which have been obtained through the courtesy of Mr. Strong.

The Clerk: GG and JJ; Phillip Himmelfarb will be GG and Ruth Himmelfarb will be HH.

Mr. Strong: No objection.

(The income tax returns referred to were received in evidence and marked Defendant's Exhibits GG and HH respectively.)

Mr. Robnett: May it be understood, your Honor, that the evidence offered by Mr. Katz is not being offered on behalf of Mr. Ormont and is not binding upon him, and that I have objected to the same on the ground that it is incompetent, irrelevant and immaterial and hearsay as to the defendant Ormont. You will recall the situation as to the charges.

The Court: Yes.

By the way, I should advise the jury at this time that the case is now pending against Sam Ormont only on Count 1. That is the 1944 income tax return of Sam Ormont. It is now pending against the defendant Himmelfarb only as to Count 2 and no other counts against the defendant Phillip Himmelfarb. It is now pending against Sam Ormont only as to Counts 3 and 4, which are 1942 and 1943.

Mr. Robnett: I would ask your Honor also at this time to kindly instruct the jury that the evidence of Mr. Phoebus as to all conversations prior to May 24, 1944 have been stricken from the record.

The Court: That is correct. All the conversations by Mr. Phoebus with the defendant Ormont, which were allowed in evidence heretofore prior to May 24—May 24th was the incident in the office of Mr. Bircher in the Federal Building where he was warned of his rights—all previous conversations

with the defendant Ormont are stricken from the record, and the jury instructed to disregard it.

Mr. Strong: Would you also advise the jury that there was only one previous conversation testified to by Mr. Phoebus?

The Court: No, there were two, May 18th and a short one on May 23. I don't know that there was any conversation that they entered into at that time; it was a visit at the plant, I believe.

Mr. Strong: Yes. We did not get that far.

The Court: I believe that is correct.

Mr. Katz: If the Court please, also we ask that a series of checks, payable to the Collector of Internal Revenue, be marked for identification as one exhibit, and another series of checks payable to the Collector of Internal Revenue be marked for identification as another exhibit.

The Court: Are they different years?

Mr. Katz: They are different years.

The Court: What is the first year?

Mr. Katz: 1944.

The Court: 1944 checks will be II and 1945 checks will be JJ. [1203]

(The checks referred to were marked Defendant's Exhibits II and JJ respectively for identification.) [1204]

Mr. Katz: At this time, if the Court please, I will call Mr. Ralph Kibbee.

